COMPETITION POLICY AND REGULATORY REFORM IN BRAZIL: A PROGRESS REPORT

CLP Delegates will find attached FOR INFORMATION an OECD report on Competition Law and Policy Developments in Brazil. This report was prepared in the context of the OECD CCNM/Brazil co-operation programme.
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A PROGRESS REPORT

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Executive Summary

Brazil has had a competition law for 38 years, but the modern era in competition policy in the country began in 1994, when a new competition law was enacted. The law provided important new powers for CADE, the government agency responsible for enforcing the law. At the same time, with the adoption of the Real Plan, Brazil undertook significant market reforms that paved the way for the introduction of competition policy in most sectors of the Brazilian economy.

The 1994 law broadly resembles the competition laws of other countries, proscribing anticompetitive conduct, including single firm conduct by monopolists or dominant firms and anticompetitive agreements, and anticompetitive mergers. The law created CADE as an independent agency, consisting of seven voting members, including a President and six commissioners. The members serve for terms of two years, subject to the possibility of reappointment for one term. The Brazilian system is unique, however, in that two other government bodies, SDE in the Ministry of Justice, and SEAE in the Ministry of Finance, are designated in the competition law as having principal advisory and investigative roles in competition enforcement. Cases are begun in SDE, which, with the assistance and advice of SEAE, conducts preliminary investigations and administrative proceedings before submitting the file and its recommendations to CADE, which renders the final judgement.

The provisions in the competition law relating to anticompetitive conduct, Articles 20 and 21, are somewhat broad and ambiguous. In the first years after 1994 CADE considered many conduct cases, but almost all of them were leftover cases from pre-1994, mostly involving abusive pricing issues. More recently, CADE and its sister agencies have begun to interpret and enforce Articles 20 and 21 in a more traditional manner, consistent with competition agencies in other countries. CADE has prosecuted almost no cartel cases, but there is a new emphasis in all three agencies on cartel prosecution, which parallels similar initiatives in other countries. Recently CADE published a new resolution, Resolution 20, which sets out a framework for analysis of rule of reason cases that is consistent with generally accepted analytical principles.

The 1994 law, in Article 54, introduced merger control to Brazilian competition law. It requires notification to the competition agencies of mergers that exceed certain size thresholds or that would result in a company controlling 20 per cent or more of a relevant market including Brazil. Significantly, however, the notification need not be made premerger; the law specifies that it must be made no later than 15 days after the “occurrence” of the merger. This aspect of merger notification – postmerger and not premerger – has had an important influence on both the procedure and substance of merger control in Brazil.

The number of mergers reviewed by the competition agencies in Brazil has grown rapidly in the years since 1994. The agencies devote a majority of their time and resources to merger review,
notwithstanding that in recent years CADE has intervened in some fashion in less than 5 per cent of all mergers notified (a rate of intervention that is consistent with that in other large countries). CADE has almost never prohibited a merger completely, which may be attributed at least in part to the fact that the mergers have already been consummated. When CADE has intervened it has required a partial divestiture and/or imposed a behavioural remedy upon the parties. The review of mergers by the three agencies takes an average of seven months, again a reflection of the postmerger notification regime, in which the merging parties lack incentive to complete the review quickly. The agencies are working to speed the process, however.

Perhaps the most interesting and controversial merger case to date was the AmBev case, decided in March of 2000 and involving the merger of the two largest beer makers in the country. CADE approved the merger, subject to partial divestiture and behavioural remedies. There was disagreement over whether the remedies were sufficient to eliminate the perceived anticompetitive effects of the transaction.

This report includes comments and recommendations relating to competition enforcement in Brazil. It recommends that increased emphasis be given to anti-cartel enforcement. This new initiative would require some additional resources. The agencies could employ their existing resources more efficiently, however, principally by reducing the time and energy devoted to the review of mergers that clearly do not present competitive problems. Other recommendations relating to the prosecution of conduct cases include devoting more attention to possible anticompetitive conduct by newly-privatised, potentially dominant firms in network industries, and addressing competitive restraints imposed by state and local governments. Recommendations relating to merger control include moving toward premerger, as opposed to postmerger, control; making the review process quicker and more efficient; reviewing the statutory notification requirements with a view toward eliminating the need for notification of mergers that, as a class, are unlikely to have any significant effect on Brazilian markets; simplifying the rules that define the date on which notification must be made, to reduce litigation on that issue; and consideration of an amendment to Article 54 that would eliminate the requirement for notification of non-merger agreements.

The report notes three important institutional issues: 1) the involvement of three separate agencies in competition enforcement – two within the government and one independent agency; 2) the short, two-year term for CADE commissioners provided in the competition law, which results in rapid turnover in the agency; and 3) the lack of a permanent, professional staff at CADE. The division of authority among three agencies offers some benefits, but at a substantial cost in efficiency and, possibly, in independence. The report does not make specific recommendations regarding a reorganisation of competition enforcement in Brazil, a matter within the competence of Brazilian authorities, but recommends that at a minimum the agencies increase their efforts toward co-ordination and consolidation of their functions. Regarding the two year term for CADE commissioners, the report notes that in addition to the turnover problems that result, the short term operates to deprive the Council of a degree of independence from government, in light of the fact that the entire Council could, in theory, be replaced within a two year period. Finally, the report notes that the 1994 law provides for the authorisation by the government of a permanent staff at CADE, but this has never been implemented. Most of the professionals work directly for commissioners, whose terms are short as already noted, or are on temporary assignment from other government agencies. The result is a lack of “institutional knowledge,” which exacerbates effects of the high turnover rate in the Council.

Part 2 of the report deals with competition policy and regulation in Brazil. It notes the importance of competition advocacy – the promotion of competition policy by a competition agency within other parts of government, including the executive, legislative and regulatory functions. The Brazilian competition agencies have begun to expand their competition advocacy function, though their resources for this activity are limited. The report also discusses the interaction of regulation and competition policy
in each of several specific sectors: telecommunications, electricity, natural gas and petroleum, railroads and bus transportation, civil aviation, ports and banking.

The pace of privatisation and regulatory reform varies among these sectors. Since 1994, three new independent regulatory bodies have been created: ANATEL, for telecommunications, ANEEL for electricity, and ANP for oil and gas. In the other sectors, government ministries continue to exert regulatory authority. In telecommunications, civil aviation and bus transportation, privatisation is virtually complete. It is only partially complete in electricity, oil and gas, railroads, ports and banking, with major privatisations still to be carried out. Competition policy appears to be more prominent in some sectors than in others. In the former group are telecommunications, electricity and ports. The competition agencies are working to establish formal relationships with the regulators in several sectors. The most prominent of these are telecommunications, electricity, oil and gas and ports.
Introduction

1. Brazil has a relatively long history in competition enforcement. In 1962 a competition law was enacted, creating the Conselho Administrativo de Defesa Econômica (CADE). For many years, however, market forces did not operate freely in Brazil. Prices were controlled to a significant degree, and most of the country’s largest industrial, transportation and financial enterprises were either state owned or publicly sanctioned private monopolies. Hence, the role of competition policy was diminished. A liberalisation process began in 1988, however, with the enactment of a new constitution. Some privatisations took place, and trade barriers began to fall. In 1991 a new competition law was enacted (law 8158/91), which resulted in some increase in competition enforcement in the country.

2. The modern era of competition policy in Brazil began in 1994. In response to a period of hyperinflation, the “Real Plan” was implemented in that year. Its principal features were the introduction of a new currency, which was then pegged to the U.S. dollar (it is no longer so, having been allowed to float as a result of the financial crisis of 1999), and tight fiscal and credit policies. As a part of the 1994 reforms, a new competition law was enacted, law 8884/94. The new law invigorated CADE, creating it as an independent agency and introducing merger control. Also, the pace of privatisation was increased in the years that followed; the agency that had the responsibility for administration of prices was abolished; and new, independent regulatory agencies for telecommunications, electricity and petroleum and natural gas were created.

3. Brazil has plainly embarked on the road toward a fully functioning market economy. Much has been achieved in this regard, but much remains to be done. This report will describe the progress that has been made in the implementation of competition policy in the country since 1994. It will describe the current competition law and the most important implementing regulations. It will describe the operations and administrative procedures of CADE and its sister agencies in the ministries of Justice and Finance. It will review CADE’s enforcement activities in the two principal substantive areas of competition enforcement, anticompetitive conduct and mergers, and it will offer some comments and recommendations in these areas. The second part of the report will deal generally with the progress toward regulatory reform and the introduction of competition in several sectors of the economy that had previously been subject to state owned or state sanctioned monopolies, including certain parts of the telecommunications, energy, transportation and banking sectors.

1. Competition Enforcement in Brazil

1.1 The Competition Law

1.1.1 Substantive Provisions

4. Law 8884 prohibits, in separate provisions, anticompetitive conduct and anticompetitive mergers. Articles 20 and 21 define conduct that is considered “a violation of the economic order,” and prohibited. Article 54 defines “acts and agreements” (generally considered to include mergers and joint ventures) that “may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services. . . .” Certain types of mergers must be notified to and approved by CADE, according to the standards set forth in the law. These two sets of substantive standards are reviewed in detail in the sections below dealing with conduct cases and mergers.
1.1.2 CADE’s Composition and Powers

5. The current Brazilian competition law, law no. 8884, became effective on 11 June 1994. The law reconstituted CADE as an independent federal agency, consisting of a President and six Board Members, or commissioners. The President and commissioners are appointed by the President of the Republic and approved by the national Senate for terms of two years. They may be reappointed for one additional term. Council members may not be removed except for certain criminal offences or other malfeasance as specified by law.

6. As of April 2000 the following individuals were members of CADE: President, Gesner José de Oliveira Filho; commissioners: Lucia Helena Salgado e Silva; Méricio Felsky; Ruy Afonso de Santacruz Lima, Marcelo Procópio Calliari, João Bosco Leopoldino da Fonseca, Hebe Teixeira Romano Pereira da Silva. On 13 May 2000 the terms of President Oliveira and commissioner Salgado expired. On 2 June 2000 the terms of commissioners Calliari and Santacruz expired. President Oliveira and Commissioner Salgado had served two terms and by law could not be reappointed. In early June, 2000, the replacements for the four whose terms had expired were announced: They were, President: Mr. João Grandino Rodas, a professor of international law at the University of São Paulo Law School; Commissioners: Mr. Celso Fernandes Campilongo (Professor of law at Pontificia University in the São Paulo Law School); Mr. Afonso Arinos de Mello Franco Neto (professor of economics at the Getulio Vargas Foundation in Rio de Janeiro); and Mr. Thompson Almeida Andrade (Professor at the Federal University of Rio de Janeiro School of Economics).

7. The Council has the typical powers associated with a competition enforcement agency, including: to hear and decide cases involving breaches of the substantive provisions of the law; to issue orders requiring the cessation of unlawful activity and the implementation of performance commitments to remedy the same; to issue interim preventive orders, pending completion of an administrative proceeding before it; to require the submission of information from both public and private entities in the course of its proceedings, with due regard for the protection of confidential information; to impose fines on corporations of between 1 and 30 percent of the gross pretax revenue in the previous year for violations of the substantive provisions of the law prohibiting anticompetitive conduct (not including mergers), and fines upon individual managers responsible for such unlawful conduct of between 10 and 50 percent of the corporate fine; and to impose fines for failure to observe an order of the Council or to provide information as requested by the Council.

8. As described below, many of the investigative and analytical functions associated with enforcement of the competition law are performed outside of CADE. As a result, CADE itself is relatively small and unstructured. In addition to the six commissioners and the President, there is a group of “assessors,” most of whom are lawyers or economists, who assist the commissioners in their analysis of the cases that come before the Council. As of April 2000 there were about 25 assessors. In addition there is a small secretariat that serves the “plenary” Council, and an administrative group of about 25 people providing such services as human resources and financial administration. Law 8884 provides for the creation of an Office of the Attorney General within CADE, with responsibilities for representing CADE in court, obtaining judicial enforcement of the decisions and orders of the Council and providing legal assistance to the Council. There are 18 to 20 attorneys in this office. Finally, at any given time there are several trainees or students on assignment to CADE who assist in all functions of the agency.

9. CADE’s staff is not “permanent,” that is, its members are not directly employed by CADE. Law 8884 provides that the Congress shall provide for such a staff, but to date that has not been done. Some of the assessors are the recipients of special appointments under the control of the commissioners. These assessors work directly for a given commissioner, and their term of employment, in principle, is essentially
that of the commissioners for whom they work. The other employees are civil servants on assignment from other government agencies.

1.1.3 The Administrative Process: SDE and SEAE

10. Law 8884 provides that the investigative functions, and some preliminary enforcement functions, are to be performed by the Economic Law Office of the Ministry of Justice (Secretário de Direito Econômico do Ministério da Justiça – SDE).[5] SDE is headed by a Secretary and is divided into two Departments, one with responsibilities for enforcing the competition law, the other responsible for the consumer protection law. As of April 2000 there were about 28 people employed in competition enforcement, including 18 professionals and ten administrative personnel.

11. SDE can initiate a “preliminary investigation” into a possible violation either ex officio or upon a complaint or request of an interested party. SDE has powers to require the subjects of the investigation and other private and public entities to provide information during this phase. The existence of a preliminary investigation is confidential, and is not publicly disclosed.[6] On or before the conclusion of 60 days (which may be extended by requests for information), SDE can decide to close the investigation, which must be approved by CADE, or to commence “administrative proceedings,” which are a more formal stage in the investigative process. The respondent or subject of the investigation is formally informed of the nature of the alleged violation and is asked to submit a defense thereto. SDE may conduct further discovery and has full information gathering powers at this stage, including the power to obtain the testimony of witnesses. At the close of this phase, SDE will issue a written report containing its findings and recommendations and forward it and the case file to CADE.

12. SDE can, either ex officio or upon the request of the CADE Attorney General, enter a “cease and desist order” at the administrative proceeding stage when it concludes that there are “sound reasons to believe that the defendant directly or indirectly caused or may cause irreparable or substantial damages to the market, or that he/it may render the final outcome of the proceedings ineffective.”[7] The order can be appealed to CADE.

13. The Secretariat for Economic Monitoring of the Ministry of Finance (Secretaria de Acompanhamento Econômico – SEAE) also has an important role in competition enforcement. Law 8884 provides that SDE must inform SEAE of the commencement of an administrative proceeding, and SEAE may elect to provide an opinion to SDE on the matter.[8] Further, a separate law provides SEAE with powers to investigate possible violations of the competition law.[9] Accordingly, SEAE may separately or in co-operation with SDE conduct such preliminary investigations. SEAE has no adjudicatory or enforcement functions under the competition law, however.

14. Headed by a Secretary, there are approximately 200 employees in SEAE, including many expert economists. There are four major organisational components within SEAE, one for each of four segments of the economy: industry, services, infrastructure, and agriculture. SEAE has three principal responsibilities, one of which is its advisory function under the competition law. The others are providing regulatory analysis (including monitoring of prices) and economic monitoring (in a macroeconomic context). Approximately 60 SEAE employees work principally in competition policy and analysis.

15. Upon receipt by CADE of the SDE report in a matter, the case is assigned on a random basis to one of the six commissioners, who is designated as the Reporting Commissioner, and to the CADE Attorney General. The law requires that the Attorney General provide an opinion on the case within 20 days,[10] the Attorney General’s opinion generally focuses on the legal aspects of the matter, but it can extend to substantive issues as well. The Reporting Commissioner must decide whether to institute a
supplementary investigation within 60 days of receiving the case. CADE is provided with the same powers as SDE to acquire information.\textsuperscript{11} It is rare that a supplemental investigation is begun, however. More often, if CADE decides that it requires more information it sends the matter back to SDE for that purpose. Upon completion of the 60 day period or the supplemental investigation the case is placed on the CADE trial document “to be judged as soon as possible.”\textsuperscript{12} The decision of the Council is rendered at a public meeting. A quorum of five members (the President is one of the seven voting members) is required; a decision is taken by a majority of those participating. If a vote is tied, the President is given an extra vote.

16. The law provides that CADE decisions “do not qualify for Executive Branch review; accordingly, any such decisions shall be promptly executed. . . .”\textsuperscript{13} The CADE Attorney General can initiate an enforcement proceeding in court to enforce a judgement if necessary. Respondents in CADE proceedings can appeal to the courts from a CADE decision. Article 53 of the law provides that either CADE or SDE (subject to approval by CADE) may enter into agreements with a party in which the party agrees to cease and desist from the conduct that is the subject of the proceeding. The agreement does not constitute an admission of liability or guilt by the party.

17. Special procedures apply to the review of mergers, as provided in Article 54 of law 8884. Those procedures are discussed in detail in the section below dealing with mergers. In general, Article 54 requires that mergers involving firms that are larger than a specified minimum or having a market share larger than a specified minimum must be notified to SDE, which promptly provides copies to CADE and SEAE. SEAE must issue a technical report to SDE within 30 days, and SDE must in turn issue a report within 30 days of receiving the SEAE report. The reports are forwarded to CADE, which must issue its decision within 60 days thereof. If CADE does not render a decision within its 60 day period the merger is considered to have been automatically approved. Each of the three agencies, however, has the power to request the merging parties to provide additional information. Such a request has the effect of suspending the running of the applicable time period until the information is provided.

1.1.4 The States and Rights of Private Parties

18. Brazil has a federal system of government. There are 26 states and one federal district in the country. The state governments do not have separate competition laws, and they do not exercise general regulatory authority except in certain public utility markets that are reserved to the states by the national constitution, for example, natural gas distribution (see Part II below).

19. Law 8884\textsuperscript{14} provides that private parties can institute private actions in court for redress of injury suffered as a result of a violation of the law, including the recovery of money damages. Private parties can also submit complaints and supporting evidence to CADE, SDE or SEAE, which shall be considered confidential. Private parties (except for defendants) do not have the right of appeal from decisions of CADE or SDE.

1.1.5 Implementing Regulations

20. CADE has published additional regulations implementing law 8884. Resolution 12, published on 31 March 1998, specifies additional internal rules of operation for the Council. It prescribes procedures for Council meetings, evidentiary hearings, judgement proceedings, enforcement of judgements and protection of confidential information. Resolution 15, published on 28 August 1998 and replacing an earlier resolution, number 5, contains regulations relating to merger review. Certain parts of the resolution are discussed in greater detail below in the merger section. The resolution prescribes additional procedures for review of mergers by the Council, and, by means of exhibits to the resolution, specifies the information
that must be supplied by the merging parties in the initial notification (Exhibit I), in response to a request for additional information (Exhibit II) and by third parties in response to a request for information (Exhibit IV). Resolution 16, also promulgated in 1998, established a code of ethics for the commissioners.

21. Resolution 18, published on 25 November 1998, implemented a procedure for obtaining a nonbinding opinion, or “consultation,” from CADE on any matter within its competence. The applicant, who can be any individual, business entity or public agency, must submit information about the conduct that is the subject of the consultation, which can include mergers, according to a form set forth in the resolution. CADE may issue an opinion as to whether in its view the proposal is in contravention of the substantive provisions of law 8884, or in the case of a practice that is underway, refer the matter to SDE for investigation. The applicant for a consultation must pay a fee of R$ 5,000.

22. The most recent resolution, number 20, was published on 9 June 1999. It contains provisions designed to speed the judgement process in non-merger cases. Also, two annexes to the resolution contain guidelines for the analysis of conduct (not including mergers) under the substantive provisions of law 8884. Those guidelines are described in greater detail below in the section dealing with conduct cases.

1.2 Conduct Cases

23. Articles 20 and 21 of law 8884 deal with all types of anticompetitive conduct other than mergers, unlike the laws of many other countries which separately proscribe anticompetitive agreements and single firm, abusive conduct.

24. Article 20, the general provision, proscribes . . .

any act in any way intended or otherwise able to produce the effects listed below, even if any such effects are not achieved . . .

I – to limit, restrain or in any way injure open competition or free enterprise;
II – to control a relevant market of a certain product of service;
III – to increase profits on a discretionary basis; and
IV – to abuse one’s market control.

The article specifically excludes from the violation in item II, however, the achievement of market control by means of “competitive efficiency.” The article further provides that a dominant position is presumed when “a company or group of companies” controls 20 per cent of a relevant market; The article provides that CADE may change that 20 per cent threshold “for specific sectors of the economy,” but CADE has not done so formally to date.

25. Article 21 contains a lengthy list of acts that are considered violations of Article 20 if they produce the effects enumerated in Article 20, though the list is not exclusive. Some of these enumerated practices are: collusion with competitors on prices or terms of sale, on market allocation or on “uniform or concerted business practices”; bid rigging; “affect[ing] third party prices by deceitful means”; restraining or limiting market access by new companies, limiting development of existing competitors, or limiting access by competitors to raw materials, distribution channels or other necessary inputs; agreements limiting technology development, production, or investment; vertical restraints affecting prices, discounts, volumes, profit margins, or other marketing conditions relating to third parties; tying practices; price discrimination; imposing unreasonable contractual terms or conditions, or terminating or limiting business relations for unreasonable reasons; destroying or rendering unfit raw materials, intermediate or finished goods, including agricultural products; “unreasonably sell[ing] products below cost;” discontinuing
production or other business activities without good cause; and imposing “abusive prices or unreasonable increase of prices.”

26. Since the enactment of law 8884 CADE has considered a total of 850 conduct cases. That number is in some ways misleadingly large, however. It encompasses several types of decisions, including review of decisions by SDE to close a preliminary investigation, review of SDE administrative proceedings, appeals from cease and desist orders by SDE under Article 52, and consultations under Resolution 18. The number of CADE’s conduct decisions swelled dramatically from 22 in 1994 to 484 in 1996, but then fell to 186 in 1998 and 109 in 1999. 1996 was not typical; many matters left over from the 1991 law were disposed of, including many abusive pricing cases (discussed further below). CADE is still considering a few cases under the 1991 law. Cases in which CADE concluded that a violation of the law had occurred and implemented remedial action or imposed a fine are a small part of the total (less than 10 per cent of the conduct cases considered by CADE in 1997 and 1998 resulted in a finding of unlawful activity). Three categories of conduct cases – cartels, non-cartel agreements and abuse of dominance – are next discussed in further detail.

1.2.1 Cartel Agreements

27. The 1998 Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels defines a “hard core cartel” as

. . . an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce; . . . the hard core cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country’s own laws, or (iii) are authorised in accordance with those laws.

The Recommendation concludes that “hard core cartels are the most egregious violations of competition law and that they injure consumers in many countries by raising prices and restricting supply.”

28. Articles 20 and 21 of law 8884 clearly encompass cartel conduct and prohibit it. CADE has considered very few cases involving “traditional” cartel conduct, however. CADE and Brazil are certainly not unique in this regard. In many countries, especially those in which competition enforcement is relatively new or has been only recently emphasised, few cartel cases have been prosecuted. There can be several reasons for this phenomenon: competition agency staff are inexperienced in conducting investigations of this type of conduct, which requires special skills and techniques; they may lack the necessary legal and investigative tools for acquiring information about agreements that are intentionally kept secret by their participants; the business and consumer communities may be unsophisticated in recognising signs of cartel conduct and unmotivated to co-operate with the competition agency in prosecuting it.

29. Only recently, however, there has been a new emphasis placed on prosecuting cartels in all of the three competition agencies. In 1999 CADE concluded what many in the agency consider the first true cartel case under law 8884, involving the steel industry.
The Steel Cartel Case

The case involved an alleged agreement in 1996 to increase the prices of flat rolled steel products, including hot and cold rolled sheet, galvanised sheet and plate. There were only three domestic producers of those products, two of which were linked by a 50 per cent cross-ownership. In July of 1996 representatives of the Brazilian Steel Institute met with officials of SEAE and informed them that its members intended to increase their prices on these products by certain specified amounts on a specific day. The background to this meeting is that until 1992 these products were subject to price controls, which were administered in part by SEAE. Producers were required to submit proposed price increases to SEAE. There were no such controls in 1996, however.

On the day after the meeting SEAE informed the Institute by fax that such an agreement was a violation of the competition law and illegal. Nevertheless, the three producers each implemented price increases on these products in early August of that year. The increases were approximately the same as those given to SEAE by the Steel Institute. They were not identical across the three companies, but in most cases they did not vary by more than .5 per cent. About one year later the companies implemented a similar increase, though there was no preliminary notice given to SEAE.

SDE initiated an investigation, assisted by SEAE. It was determined that these flat rolled steel products constituted relevant product markets, there being little possibility for demand side or supply side substitution. The relevant geographic market was limited to Brazil. Imports of these products were not significant, and the prices of the imports were higher than those of domestic products. Entry barriers into these markets were considered high, involving large economies of scale and high sunk costs. The three firms, effectively only two, were judged to have significant market power.

The defendants denied that they had formed an agreement. They admitted that prior to the meeting with SEAE the top executives of the firms had met, but they denied that an agreement had been reached. SDE was not able to develop direct evidence of an agreement. It was unable to question executives of the three firms directly about the matter. SDE and CADE concluded, however, that there was sufficient indirect evidence of agreement. That evidence included the executives’ meeting prior to the SEAE meeting, the statement of intent to increase prices at the SEAE meeting, the nearly identical, nearly simultaneous increases in August of 1996, and the lack of evidence otherwise supporting independent decisions by the steel companies to increase prices at that time. CADE concluded that the 1996 conduct was unlawful. It did not include the 1997 increase as a part of the violation, as there was no evidence of a meeting or communications among the firms prior to that increase.

CADE imposed the minimum fine under the law of 1 per cent of the previous year’s gross turnover of each firm, which amounted to about R$51 million, plus fines of R$5 million for supplying false information. The defendants have appealed the decision and the fines; the appeals are pending.

30. There are new initiatives at SEAE and SDE regarding anti-cartel enforcement. In recent years, the greater part of the time and resources at both agencies had been devoted to merger investigations, but officials there have resolved to devote more resources to detecting and investigating cartels. SEAE recently established new units in each of the three cities of Sao Paulo, Rio de Janeiro and Brasilia specifically for the purpose of conducting cartel investigations. As noted above, SEAE has certain information gathering powers independent of law 8884, though these are limited. It lacks substantial powers to compel the production of information, for example. Accordingly SEAE is working closely with SDE in developing cartel investigations.

31. SDE is also restructuring for the purpose of devoting additional resources to anti-cartel enforcement. Since mid-1999 SDE has begun 10 new cartel investigations, including investigations in
aluminium, civil aviation, petrol stations, maritime transport, a possible buying cartel in orange juice, lysine and vitamins (the lysine and vitamins investigations having been developed from prosecutions of international cartels by the United States), and some bid rigging cases. Several of these investigations were initiated first in SEAE.¹⁵

### GENERIC DRUGS

A recent conduct case that could be classified as a cartel case involves an alleged agreement among manufacturers of branded pharmaceuticals to eliminate competition from generic drugs, the sales of which have been growing rapidly in Brazil. In a complaint by the Regional Pharmaceutical Council of the Federal District it was alleged that 21 of the largest pharmaceutical firms in Brazil, many of them multinational companies, had agreed to boycott distributors who sold generics. The complaint included evidence of an agreement reached in a meeting of the national sales managers of those companies. SDE quickly initiated a preliminary investigation that confirmed the existence of such meeting. An administrative proceeding was then opened in SDE, which issued a preliminary injunction under Article 52 ordering the respondents to cease their boycott, under the sanction of a daily fine of R$100,000 for violations of the order. There were more than ten appeals to CADE from the injunction order, but CADE upheld SDE’s decision. As of June, 2000, the administrative proceeding was continuing in SDE.

32. SDE is considering the use of more aggressive investigative techniques in cartel cases, including conducting direct interviews with executives of suspected cartel members and the possible use of search warrants (these two techniques were employed in the vitamins investigation). SDE has had some difficulty in enforcing mandatory requests for information, particularly those requiring the production of documents. It is exploring means of increasing the effectiveness of such requests, including making requests for specific documents as opposed to more general, broad requests, and the use of surprise visits to business premises. It is considering prosecuting cartel cases under the country’s criminal code. SDE or CADE could refer such cases to Federal prosecutors, who would conduct the prosecution. There are concerns at both SDE and SEAE, however, about a shortage of staff for these new initiatives.

33. Finally, the 1998 Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels, noted above, reflects a new, world-wide emphasis on prosecution of this conduct. The Recommendation recommends that countries bring about convergence in their laws dealing with hard core cartels by providing effective sanctions and enforcement powers against such conduct, and that countries co-operate in cartel investigations, to the extent permitted by their laws. The Recommendation invites non-Member countries to associate themselves with the Recommendation and to implement it. In June, 2000, Brazil became the first non-Member country to formally associate with the Recommendation, by means of a formal exchange of letters with the OECD Secretary General.

1.2.2 Non-cartel agreements

34. CADE has considered several non-cartel agreement cases in recent years, many of which arose in the health care industry. While Brazil has a public health service, there is also a large private health care sector. Several of CADE’s cases in 1999 involved “Unimeds,” which are co-operative associations of doctors. Almost every town or city has a Unimed. The principal feature of these associations affecting competition is their requirement of exclusivity; doctors who are members of Unimed are forbidden from contracting with other health plans. In many towns, especially small and medium-sized ones, 90 per cent or more of the doctors belong to Unimed. In these markets, Unimed’s exclusivity rule effectively prevents
other health plans from competing there. CADE considers Unimed cases on a city-by-city basis, and where Unimed’s market share is high, it orders that the exclusivity clauses be eliminated. Elsewhere in the health care sector, CADE prosecuted local and regional medical associations for the publication of price tables covering various medical services. It ordered the associations to cease publishing such tables and levied small fines.

35. Since the promulgation of Resolution 18 in 1998, which provides for consultations, or nonbinding opinions by CADE, there have been 24 such opinions issued. Some of these have involved horizontal arrangements. Others have involved restraints imposed by state or local governments. In one case, CADE considered a rule issued by the government of the City of Brasilia regarding associations of taxi drivers. CADE considered the rule to be a violation of law 8884 and requested the city to change it. Article 7 of the law provides that CADE can “request from the Federal Executive Branch agencies and from state, municipal, the Federal District and territorial authorities the taking of all acts required for compliance with this Law.” CADE has made three such Article 7 requests. It does not have the power to enforce such requests, but it can request that a federal prosecutor take the case to court. This procedure was utilised successfully in one case, involving an agreement among taxi operators in Brasilia.

1.2.3 Vertical restraints

36. CADE has also considered some vertical restraint cases under the competition law, although these are relatively few in number. It examined the legality of suggested resale price lists issued by an ice cream manufacturer, and concluded that the effect of the lists was only to suggest prices and not to impose them, and hence that the conduct was not unlawful. It considered a case in which four large, U.S.-based motion picture distributors refused to license pictures to one exhibitor in a town in favour of another, which operated newer and larger theaters. CADE concluded that the distributors’ conduct was lawful, that the movie distribution market in the town was on the whole competitive, and that the complainant had sufficient alternative sources of supply of motion pictures. It has considered two cases arising under the 1991 competition law involving alleged tying practices by photocopier manufacturers. The issues were similar to those that arose in the well-known Kodak case in the United States that was decided at approximately the same time. The manufacturers were accused of tying maintenance service to the sale of new machines. CADE concluded that the conduct at issue was unlawful, although in view of the intervening enactment of law 8884 and the much more recent publication of Resolution 20, discussed below, it is doubtful that these cases, or at least the analysis in them, represent CADE’s current views on tying.

1.2.4 Abuse of dominance

37. The data show that CADE has considered many abuse of dominance cases in recent years, but most of these have been abusive pricing cases. Few have involved exclusionary conduct that is often associated with abuse of dominance. Two matters involving vertical restraints by dominant firms are presently before CADE, however, after SDE and SEAE issued recommendations for corrective remedies and fines. In one, British America Tobacco Company, which controls a number of cigarette brands and has well over 50 per cent of cigarette sales in Brazil, was accused of unlawfully imposing exclusive dealing requirements on retail establishments. SDE concluded that retail establishments in airports and shopping centers were separate markets, in which BAT had as much as a 100 per cent market share. SDE and SEAE recommended that BAT’s exclusive dealing with these retailers be banned completely. As for such agreements with other retailers, SDE and SEAE recommended that the agreements be limited in time and that automatic renewal clauses be eliminated, to permit competition for such contracts as they expire. In the second case, SDE concluded that Liquid Carbonic Corp. (now called White Martins Corp.), which
then controlled as much as 98 per cent of the sales of liquid carbon dioxide gas in Brazil, had engaged in unlawful price discrimination and the tying of the transportation of the gas to the sale of the product itself.

38. Article 20 of law 8884 defines acts taken “to increase profits on a discretionary basis” as a “violation of the economic order,” and unlawful. Article 21 specifically prohibits “imposing] abusive prices, or unreasonably increase[ing] the price of a product or service.” In the early years under law 8884 CADE dealt with many abusive pricing cases that arose under the 1991 law, dismissing most of them. Few such cases have arisen under law 8884. SDE and CADE have taken the position that abusive pricing can only occur in the context of an abuse of a dominant position. Very recently, however, a Congressional commission, the Medication Inquiry Commission, has requested that SDE begin administrative proceedings into high prices of prescription drugs in Brazil. Article 30 of law 8884 provides that SDE must initiate an administrative proceeding at the request of the Senate or House of Representatives without first conducting a preliminary inquiry. Accordingly, SDE has begun 53 abusive pricing proceedings involving more than 300 drugs.

1.2.5 Resolution 20

39. As noted above, Article 21 of law 8884 is somewhat unorthodox. In its list of designated anticompetitive practices it does not distinguish specifically between those that are relevant to the prohibition of restrictive agreements and those that relate to abuse of dominance. Some of the enumerated practices are ambiguously worded or, as described, are not traditionally considered as anticompetitive conduct (e.g., “to deny the sale of a certain product or service within the payment conditions usually applying to regular business practices and policies;” “to retain production or consumer goods, except for ensuring recovery of production costs;” or “to take possession of or bar the use of industrial or intellectual property rights or technology.”). Thus, the potential exists for misinterpretation of these provisions and misapplication of the law (though there is little evidence of such effects to date).

40. On 9 June 1999 CADE published Resolution 20, its most recent resolution. Two annexes to the resolution contain useful guidelines for the analysis of “restrictive trade practices.” The resolution requires that “[t]he reporting council member [on a case in CADE] must verify whether the proceeding was duly supported with the elements necessary to form his opinion in view of Annexes I and II to this Resolution, which are mere guidelines.” The guidelines employ familiar, traditional concepts of competition analysis, which are applied in one form or another by the competition authorities of many countries. Resolution 20 appears to be an attempt to steer competition analysis in Brazil along traditional lines; its concepts are familiar to many competition law practitioners.

41. Annex I to the resolution contains definitions and classifications relating to anticompetitive practices. It defines and differentiates between “cartels” and “other [horizontal] agreements.” It does not specifically apply a “per se rule” to the former, but it implies that a stricter standard applies to cartel conduct. The annex notes that non-cartel agreements may have beneficial, pro-competitive effects, which requires “a more judicious application of the rule of reason.” The annex defines “predatory pricing” as “deliberate practice of prices below average variable cost, seeking to eliminate competitors and then charge prices and yield profits that are closer to monopolistic levels.” The definition specifically requires that conditions exist that would permit the recovery of the initial losses after a successful exclusion of competitors from the market. The annex also defines vertical restrictive trade practices, noting that their principal anticompetitive effects can be to exclude rivals or to facilitate downstream or upstream collusion, but also that such practices can benefit competition in certain instances, thus requiring the application of the rule of reason. It notes that “vertical restrictive practices presume, in general, the existence of market power in the relevant market of origin. . . .”
42. Annex II outlines “basic criteria for the analysis of restrictive trade practices.” It describes a series of steps that are to be followed. They include: definition of the relevant market in both product and geographic dimensions, applying considerations of actual or potential substitution by buyers; developing market shares and measures of concentration, using either or both of the CRx and HHI indices; analysis of barriers to entry; analysis of the competitive effects of the practice; analysis of the economic efficiencies likely to result from the practice; and balancing the efficiencies against the competitive harm from the practice, if necessary. To date there has been little experience under these guidelines, but their purpose appears clearly to place competition analysis at Cade within the mainstream.

1.3 Mergers

1.3.1 The law and procedure

43. The controlling provision in law 8884 relating to mergers is in Article 54:

Any acts that may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services, shall be submitted to Cade for review.

44. This language would appear to include all agreements, not just mergers, and there have been no regulations published that would clarify the issue. To date, however, most of the notifications submitted have involved mergers.

45. Article 54 does not contain language specifically setting forth the substantive standard to be employed by Cade in reviewing mergers. Paragraph 1 of the article, however, provides that a merger shall be approved that has the four following attributes:

1. the transaction “increase[s] productivity; improve[s] the quality of a product or service; [and] cause[s] an increased efficiency, as well as foster[s] technological or economical development;”
2. the resulting benefits of the transaction are “ratably allocated” between the merging parties and consumers;
3. the transaction does not eliminate “a substantial portion of the relevant market for a product or service;”
4. the transaction is limited to acts that are necessary to obtain these beneficial effects.

This language could be interpreted to place the burden on the merging parties of showing that their transaction is economically beneficial. In practice, however, Cade has not imposed such a requirement, intervening only when it concludes that on balance there would be a significant lessening of competition. This paragraph is considered to provide an efficiencies defence, to be applied only in the case of mergers that are otherwise anticompetitive.

46. Paragraph 2 of Article 54 contains a special provision that permits mergers to be approved that satisfy only three of the four attributes enumerated in Paragraph 1 and that are “in the public interest or otherwise required to the benefit of the Brazilian economy, provided no damages are caused end-consumers.” Such a provision is found in some form in the merger control laws of several countries, permitting the approval of otherwise anticompetitive mergers that present issues of overriding national interest. To date, however, no merger in Brazil has been approved specifically under this provision.
Paragraph 3 of Article 54 defines the mergers that are subject to control by CADE. Mergers must be notified to CADE that satisfy either of two tests: the resulting company or group of companies “accounts for twenty percent (20 per cent) of a relevant market,” or any of the participants to the transaction had total world-wide turnover in the most recent year of R$ 400 million. Beginning in 1999, a notification fee of R$ 15 million was imposed.

An important feature of the merger notification scheme in Brazil, one that has in many ways shaped the course of merger control in the country, is that the notification, while mandatory, need not be made premerger, that is, the parties are not forbidden from consummating their transaction before or during the review of the transaction by the competition agencies. Paragraph 4 of Article 54 requires that the notification must be made “no later than fifteen business days after the occurrence . . . [of the transaction] (emphasis added).” Resolution 15, the implementing regulation for merger control, further defines the date on which the 15 day period begins to run as the date on which “the first binding document [is] settled by the Applicants,” or on the date on which there occurs “alterations in the competition relations between the Applicants or at least between one of them and a third party . . . .”

Article 54 sets forth the procedures for the review of notified transactions. The notification is to be made to SDE, which promptly supplies copies to SEAE and CADE. SEAE must within 30 days provide a technical report to SDE, which must, within 30 days of receipt of the SEAE report, provide a recommendation to CADE. At that point the files are transferred to CADE, which must render a decision with 60 days. If CADE does not issue a decision within the 60 day period the merger is deemed to be approved. Thus, the statutory period for merger review under Article 54 is 120 days, although any of the three agencies can complete its review in less than its allotted time. Each of the three agencies, however, also has the power to issue one or more requests for additional information, and the running of the statutory periods is suspended from the time of the request until the information is supplied.

Resolution 15, the implementing merger regulation, was adopted on August 19, 1998, superseding Resolution 5. An avowed purpose of Resolution 15 was to speed up the merger review process. It provides for immediate distribution to a designated Reporting Commissioner of the notification upon receipt by CADE, and for consultations between CADE and SEAE during the initial stage of review at SEAE. It permits the Reporting Commissioner to make a preliminary determination that a formal judgement proceeding is not necessary in the case of a merger that plainly poses no competition issues, and upon concurrence of the other commissioners, to simply permit the 60 day period to lapse, resulting in automatic approval of the transaction.

The resolution made substantial revisions to the notification form that had been employed under Resolution 5, introducing a “two stage” process. The notification form, set forth in Exhibit I to the regulation, is a simplified and shortened version of the original. Based to a significant degree on the “Framework for a Notification and Report Form for Concentrations,” contained in the report of the OECD Competition Law and Policy Committee on “Notification of Transnational Mergers” (1998), the form requires information about the parties to the transaction and their affiliates, their main lines of business, the transaction that is the subject of the notification, and information about certain “relevant markets,” including estimates of total turnover, market shares and imports, and identification of the five largest customers and suppliers of the merging parties and of entry conditions in the market.

Also attached to the resolution are two other forms requesting information, one to be issued to the merging parties requiring substantially more information in the event the Reporting Commissioner determines that a “complementary investigation” is required, and a much shorter one to be issued to relevant third parties, if necessary, in the course of CADE’s review.
1.3.2 The merger review experience

53. CADE has reviewed a steadily increasing number of mergers since the enactment of law 8884. In the period between March 1994 and December 1997 CADE considered a total of 99 mergers; in 1998 alone, 144; in 1999, 226; and in 2000 the number could be up to twice that of 1999. The CADE secretariat has generated some useful statistics that further describe the mergers that have come before it. Of the two independent criteria that define the obligation to notify, 52 per cent of the notifications were triggered by the R$ 400 million world-wide turnover threshold in 1999, 12 per cent by the 20 per cent market share threshold, and 36 per cent by both. Of the mergers notified in 1999, 75 per cent involved effects on Brazilian markets primarily from operations in Brazil, 25 per cent from abroad. Fully 78 per cent, however, involved participants whose ownership, at least in part, was from abroad. Almost 50 per cent were horizontal mergers, 31 per cent conglomerate, and the remainder divided between vertical and market extension mergers. In 65 per cent of the cases in 1999 the relevant geographic market was national, in 21 per cent regional, and in 6 per cent the world (the remainder not noted).

54. With the increase in the number of merger notifications has come a corresponding decrease in the number of cases in which CADE intervened in some fashion to require modifications or performance commitments. In the 1994-96 period, 50 per cent of the mergers considered by CADE required some intervention. That proportion dwindled to 19 per cent in 1997, and in 1998 and 1999 it fell to about 3 per cent. In almost no case, possibly in part because CADE does not review mergers \textit{ex ante}, was a merger prohibited outright or fully broken apart after consummation. In a few cases each year merger notifications are withdrawn for various reasons.

55. CADE applies a traditional form of merger analysis to the cases that come before it. In a recent paper a CADE commissioner described the analytical steps:\textsuperscript{26}

\begin{table}[h]
\centering
\begin{tabular}{|l|}
\hline
\textbf{SEVEN STEPS FOR MERGER AND ACQUISITION ANALYSIS:} \\
\hline
- define the relevant markets (in geographic and product terms) \\
- identify market participants \\
- define market structure \\
- identify conditions of entry \\
- presumed anticompetitive effects \\
- assign efficiencies \\
- test the failing firm argument \\
\hline
\end{tabular}
\end{table}

56. In 1999 SEAE published a more detailed set of merger guidelines.\textsuperscript{27} These guidelines employ concepts that are found in similar guidelines published by other countries, including those in the United States “Horizontal Merger Guidelines.” The SEAE guidelines describe five steps in the analytical process:

1. Definition of the relevant geographic market
2. Determination of market shares and concentration
3. Examination of conditions for the exercise of market power
4. Consideration of economic benefits of the transaction (“efficiencies”)
5. Evaluation of the net effect of the transaction on economic welfare.

57. The methodology for defining the relevant product and geographic markets in the SEAE guidelines focuses on substitution by consumers in response to hypothetical changes in price. In step 2 the...
guidelines describe threshold levels of market concentration that raise concerns about the possible exercise of market power in either of two ways: by a single firm unilaterally, which firm having at least a market share of 20 per cent; or through co-ordination of firms in a market in which the four-firm concentration ratio is at least 75 per cent. If the market concentration exceeds either of those levels, SEAE will proceed to step 3, consideration of market conditions relating to the possible exercise of market power. These conditions include the opportunity for increased imports, conditions of entry, and factors that may facilitate co-ordination among rivals or that may render vertical mergers more competitively harmful. If after completing step 3 SEAE continues to have concerns about the competitive effects of a transaction, the analysis proceeds to the consideration of efficiencies that the merger may generate, and ultimately to an evaluation of the net economic effect of the transaction, focusing on the “total surplus” approach.

58. In June, 2000, SEAE and SDE agreed to a revised set of merger guidelines, based upon the SEAE guidelines, which both agencies will apply. At the time of completion of this report the two agencies had published the proposed new guidelines for public comment. It was not known whether CADE would also adopt those guidelines (there are some significant differences between these guidelines and Resolution 15), but as noted above the three agencies appear to be employing a similar framework for merger analysis.

59. As noted above, CADE does not intervene in the great majority of the mergers that it considers (which is true in many countries), and in those in which it has acted it did not prohibit the transaction outright, but rather imposed conditions or obligations upon the merged entity. A few merger cases have received significant public attention. Two of these were the Colgate-Kolynos and the Mahle-Metal Leve decisions. Kolynos involved the acquisition in 1996 by Colgate of the oral hygiene product business of Kolynos in several countries in Latin America. The two companies were leaders in Brazil in these products, which included toothpaste, toothbrushes, mouthwash and dental floss. CADE identified a competitive problem only in toothpaste, however, where the combined market share of the two companies was very high and entry was considered to be difficult. The principal barrier to entry was found to be the establishment of a consumer brand, which required the investment of high sunk costs over a significant period of time.

60. Given the importance of brands to new entry, CADE offered Colgate a choice of three remedies: outright sale of the Kolynos brand, exclusive licensing of the brand for 20 years or, for the purpose of creating “space” for new toothpaste products, “suspending” the use of the Kolynos brand in Brazil for a period of four years, coupled with the offer of a toll manufacturing agreement to existing or new competitors. Colgate chose the latter, a somewhat unorthodox remedy, as it involved the deliberate abandonment, if only for a period, of an asset with considerable value. There was some criticism of the remedy for this reason. Post merger surveys by CADE, however, appeared to justify the decision. By 1999 six new brands of toothpaste had appeared on the shelves and prices, by some measures, had fallen by 10 per cent.

61. Mahle-Metal Leve was also a 1996 case, involving the acquisition of an auto parts manufacturer by two others. Like the Kolynos case, this transaction was a “transnational” merger, involving parties operating in more than one country. The merger had been blocked in the U.S., in fact. CADE focused on the effect of the transaction in two products, pistons and piston covers. The analysis of the transaction was complex, involving virtually every issue that can arise in a merger review, including market segmentation between original equipment and the aftermarket, actual and potential competition from abroad, alleged efficiencies and the failing company defence.

62. CADE ultimately concluded that the strict requirements of the failing company defence had not been satisfied, but that the efficiency claims were plausible in the pistons market. There were no efficiency gains in the piston covers market, however. CADE therefore required a divestiture of the assets of one of the buyers that were used to manufacture piston covers. In addition, CADE concluded that the parties had
not filed their notification in a timely fashion, as required by law 8884. They were fined more than R$ 230,000 for this infraction.

63. On 29 March 2000 CADE issued what is probably its most important merger decision to date, which involved the combination of the two largest beer producers in the country.

### THE AMBEV CASE

The two parties to the merger, Brahma and Antarctica, controlled approximately 50 per cent and 25 per cent, respectively, of the sales of beer nationally. Antarctica owned several brands, its largest being the Antarctica brand. Brahma’s principal brands were Brahma and Skol. The next largest brand in Brazil was Kaiser, which was indirectly controlled by the Coca-Cola Company and whose market share was about 15 per cent. There were several other small, regional brewers operating in the country. The market shares and concentration resulting from the merger were clearly very high, and raised serious competitive concerns. The principal issue in the case involved entry barriers, (the parties also raised a strong efficiencies defence) which had three major components: the establishment of a consumer brand, access to an effective distribution system and access to retail points of sale (the great bulk of beer sold in Brazil is consumed on premises at retail establishments rather than at home).

It was considered in many quarters that entry into beer production on a large scale, at the national level, was difficult. Brazil is of course a very large country, requiring the establishment of multiple production facilities to serve the different regions of the country. It is expensive to establish a successful brand, and most of those costs are sunk. Good distributors were scarce in many parts of the country, and it would be difficult to persuade small retailers to carry an additional brand of beer. On the other hand, the Brazilian market is huge; it could likely be irresistible to the many large international brewers selling brands abroad that were already well known in many parts of Brazil. Moreover, there were recent examples of rapid, successful expansion by a few regional brewers in the country.

The competitive effects scenario presented by the merger was fairly straightforward: AmBev (a new company formed to acquire both Brahma and Antarctica) would acquire significant market power which it would exercise unilaterally. Indeed, the three largest brands of the merging parties, Brahma, Antarctica and Skol, were positioned together at the “high end” of the brand spectrum. Kaiser was positioned somewhat lower. This phenomenon could result in the now-familiar unilateral effect whereby AmBev could increase the price of one or two of the brands that were considered close substitutes and capture with the third many of those consumers who would switch as a result of the increase. (Other evidence, however, also indicated high cross elasticities between AmBev brands and non-AmBev brands.) Kaiser, through Coca-Cola, was strongly and publicly opposed to the merger. Competition experts have long learned to be suspicious of opposition to a merger by a competitor, because it may signal that the transaction would be pro-competitive, rather than anticompetitive. Kaiser could have genuinely feared what it portrayed as AmBev’s overwhelming market power, however. There was also some speculation that Coca-Cola had concerns about the effect of the merger in the soft drink sector. Antarctica controlled a very popular local soft drink, and Brahma was affiliated with Pepsi-Cola. The soft drink issues were not part of the case, however.

...
Both SEAE and SDE conducted extensive inquiries into the merger, according to the procedures provided in law 8884. Both agencies concluded that the transaction was on balance competitively harmful (though they accepted some of the efficiency claims made by the parties), and both recommended that it be approved only if AmBev were required to divest one of the three leading brands that it would control – Brahma, Antarctica or Skol – and the production facilities associated with that brand. A separate opinion was submitted to CADE by the Ministry of Industry, Trade and Development, which recommended that CADE approve the merger with no conditions. Five of the seven CADE commissioners participated in the final decision, two having recused themselves because of potential conflicts. One commissioner voted to prohibit the transaction entirely. The majority agreed on a five part remedy:

1. AmBev must divest the “Bavaria” brand, a lesser brand owned by Antarctica. It must offer for sale to the purchaser of the brand five breweries, each located in a different region of the country. And it must provide the purchaser with access to the Brahma distribution system for a period of four years, with an option for an additional two years.
2. AmBev must offer access to its distribution system to five regional brewers.
3. AmBev may not close any of its production facilities for a period of four years without first offering them for sale.
4. AmBev must provide a program of retraining and relocation to workers who are displaced by the closing of production facilities for a period of four years.
5. AmBev is prohibited from imposing exclusivity requirements on retail points of sale.

The merger was highly controversial from the outset, receiving a great deal of public attention. CADE held public hearings on the transaction in five different regions of the country. Coca-Cola was especially aggressive in opposing the transaction. Near the end of the process Coca-Cola sought as many as 12 preliminary injunctions in court, seeking to prevent CADE from issuing its decision. It was ultimately unsuccessful. CADE issued its decision in a public session, as it does all decisions. This one lasted for 14 hours, however, and was transmitted live via radio and internet. The decision was criticised in some quarters as not providing sufficient relief against the anticompetitive effects of the merger. CADE defended its decision as a compromise that sufficiently dealt with the merger’s anticompetitive effects by providing the opportunity for new entry, while also permitting the merger’s efficiency gains to be realised and its adverse effects on employment to be ameliorated.

1.3.3 Merger review procedures

64. The AmBev case highlighted procedural issues affecting merger review in Brazil, related to the fact that each of three agencies separately and consecutively conduct inquiries into each notified transaction. In AmBev, nine months expired between the date of notification and the date of CADE’s decision. The case was in SEAE for 132 days, in SDE for 84 days and in CADE for 55 days. A substantial part of the time in SEAE was attributed to delays while the merging parties were assembling information in response to a supplemental request. AmBev was, of course, an exceptional case. According to one practitioner, however, in early 1999 the average time for processing a merger notification was seven months.29

65. The agencies are aware of the problem and are working to remedy it, to the extent it is possible within existing law. SEAE and SDE are enhancing procedures for informal co-operation between them in the investigation stage. CADE’s resolution 15, described above, introduced new procedures designed to speed the review process, including the new two-step process that requires less information in the initial notification. CADE cites statistics showing that prior to the promulgation of Resolution 15 the average time for a merger in CADE (after review by SEAE and SDE) was 7 months. By 1999 that period had been
reduced to 2.4 months. Before Resolution 15 the average number of items of information requested in a CADE merger inquiry was 85. Afterward, that number was reduced to 51.30

66. There are disagreements among the agencies about the amount and character of information that should be provided in the initial notification, however. As described above, CADE’s Resolution 15 simplified the initial notification form. SEAE, however, believes that more information should be required initially. It has promulgated a separate form intended to generate sufficient information for SEAE to complete the first two steps in its analysis, market definition and determination of market concentration, without necessitating a supplemental request. The result would be the completion of SEAE review more quickly, the agency claims. Another issue confronting the three agencies is the extent to which SEAE and SDE can participate in CADE proceedings after submitting their formal recommendations. Both agencies regretted that in the AmBev case they could not defend their recommendations, which CADE ultimately did not accept, against criticism by the merging parties during the CADE proceeding.

67. An important factor that affects both procedure and substantive remedy in the merger process in Brazil is the fact that the system is not based on premerger review. The merging parties lack the strong incentive to complete the process quickly that comes with premerger review, as they are not required to suspend consummation of their transaction pending approval. From the remedial perspective, under the current system it is much more difficult for CADE to prohibit a transaction entirely, as it would require the undoing of a consummated merger, a notoriously difficult task. As noted above, in the six year history of law 8884 only twice has a merger been prohibited outright, and none since 1996. In the AmBev case, however, CADE introduced a new procedure that prevented complete consummation of the transaction during the review. It issued a preliminary order under the authority of civil law, not the competition law, that forbade the integration or closing of production facilities of the merging parties and also prevented the exchange of certain commercially sensitive information. The order permitted AmBev to acquire the shares of the merging parties but required the shares to be held separate. CADE has since entered a similar order in a second merger transaction, that involving WorldCom and Sprint.

68. Also related to the absence of premerger control in Brazil is the increasing frequency of cases in which merging parties are fined by CADE for failure to submit their notifications on time. Since the parties are free to consummate their merger before or after filing (unless CADE has issued a preliminary “hold separate” order) it is in CADE’s interest that it be notified as early in the process as possible. As noted above, law 8884 requires that a merger be notified within 15 business days “after the occurrence thereof.” CADE is empowered to levy a fine for failure to submit timely notification. Resolution 15, promulgated in August of 1998, further defines the “trigger date,” – the date on which the 15 day period begins to run – as the date of the signing of the “first binding document,” unless on an earlier date the “competition relations” between the parties are altered, resulting in “effects on the market.”

69. CADE has taken an aggressive approach toward enforcing the filing of timely notifications. In 1998, 7 per cent of all merger notifications were judged by CADE to have been filed late. In 1999 that number jumped to 19 per cent. In the period May 1998 - February 1999, CADE imposed fines totalling R$3,581,000, which was about seven times the total amount of fines that had been levied in the entire 1993-97 period. Seventy percent of those fines were for late merger notification. Given the ambiguity in the definition of the “trigger date” in Resolution 15, both CADE and the private sector are struggling to arrive at a more concrete understanding of the concept.
1.4 Comments and Recommendations

1.4.1 Conduct cases

70. The new emphasis on cartel prosecution in SEAE, SDE and CADE is commendable. It follows a world-wide trend among national competition agencies toward giving top priority to anti-cartel enforcement. There are two components to a successful initiative in this area: adding resources and improving investigation techniques and information gathering tools. The addition of new resources to the three agencies for this purpose would be welcome, and would represent public money well spent. An invigorated anti-cartel effort by CADE and its sister agencies would benefit all consumers in Brazil. SDE, with a professional staff of fewer than 20 devoted to competition enforcement, appears to be understaffed, and this problem may be exacerbated by the new abusive pricing proceedings mandated by Congress.

71. The resource problems at CADE are also serious, especially given that provisions in law 8884 authorising the creation of a permanent career staff at the agency have not been carried through. The result is not just a shortage of personnel at CADE, but possibly even more serious, the lack of a permanent, stable group of career officials whose presence preserves “institutional memory” and enhances enforcement expertise over time. The provision of such a staff should be a top priority within the government and the Congress.

72. Of course, virtually every government agency in virtually every country considers itself short of necessary resources. This is undoubtedly true in Brazil as well, and it would be unrealistic to expect that the competition agencies will receive sufficient additional money and personnel to completely support a new anti-cartel initiative. The agencies will also have to focus on means of improving the efficiency of the resources that they already have, and in particular, re-allocate resources from activities that are less important to the enhancement of consumer welfare. SEAE and SDE have recently assigned some of their existing resources to anti-cartel activity, as described above, but under present conditions their ability to do so is limited.

73. Since the enactment of law 8884 the three agencies have devoted a large and growing proportion of their resources to merger control. One official at SEAE estimated that as much as 70 per cent of his resources that are employed in competition enforcement are devoted to mergers. That proportion may be lower at SDE, but it is also quite high at CADE. Given that less than 5 per cent of all notified mergers are the subject of intervention by CADE, the agencies may be spending too much effort on merger control. Specific issues on mergers are discussed below, but it is clear that to the extent merger control procedures can be made more efficient, the other important parts of the missions of the three agencies, certainly including anti-cartel enforcement, will benefit.

74. Successful prosecution of cartels requires the development of special investigative techniques. Cartel agreements are by their nature secret; their participants usually do not willingly disclose them. It is possible to prove the existence of a cartel by indirect evidence, but that is difficult and unlikely in most cases (the steel case described above, now on appeal in the courts, is such a case). Direct evidence of a cartel can exist in one or both of two forms: documentary evidence (including computer files and e-mail), and testimony from one or more current or former participants in the agreement. The Brazilian agencies should look for means, consistent with Brazilian law, to develop both kinds of information sources.

75. In general, to acquire incriminating documentary evidence the agency must have the ability to issue sufficiently broad, enforceable requests without prior notice to the suspected entity, or possibly in the alternative, to obtain such documents directly upon a surprise visit to the entity’s premises. Coupled with these tools must be vigorous prosecution of intentional destruction of such evidence or willful failure to provide it as required. In addition to contemporaneously-created documents, a fruitful source of “inside
information” about a cartel can be the willing co-operation of a former participant who may now be antagonistic toward one or more of the participants, for any number of reasons. Otherwise, however, such information must come from a participant who would not otherwise willingly provide it.

76. Obtaining the truthful testimony of an otherwise hostile participant requires first a credible threat of severe punishment for participating in a cartel, from which a co-operating company or individual could be spared in exchange for the co-operation. Many countries are examining the successful experience of the United States with its “amnesty program,” whereby cartel participants are enticed to be the first to offer their co-operation to the U.S. Department of Justice in exchange for amnesty from prosecution or reduced punishment. Article 27 of law 8884 already contains an element of such a program: “in assessing an appropriate fine for a violation of the law CADE may take into account “the violator’s good faith.”

77. Development of either of these tools does not come quickly. First must come a credible threat of punishment, both for willful evasion of lawful requests for documents and for engaging in cartel conduct itself. Both individuals and businesses must be at risk for such violations. In this respect, law 8884 appears to be adequate, providing for substantial fines of both individuals and businesses for substantive violations of the law. Of course, the threat of large fines must be real, which requires CADE to begin imposing fines, judiciously and fairly, for intentional, harmful cartel conduct. At the same time, while developing its credibility within the business community in this area, CADE and its sister agencies can work to educate both the consumer and business communities (businesses are consumers too) about the harm to them from cartel conduct and the importance of their co-operation in reporting suspected cartels. In general, CADE has an excellent record in public relations, which can be extended to the anti-cartel effort.

1.4.2 Non-cartel conduct cases

78. These cases require the application of the rule of reason, which can be a difficult and exacting process. As noted above, certain parts of Articles 20 and 21 of law 8884 are ambiguous in this regard, but the annexes to Resolution 20 provide a good framework for the analysis of rule of reason cases. CADE’s experience in such cases is relatively limited, but those decisions that it has reached in this area, such as the health care cases described above, seem to be well grounded. Two types of matters in this area that might be worthy of increased attention from the competition agencies are possible abuses of dominance by newly privatised, still-dominant firms in network industries, including telecommunications, energy and transportation, and addressing competitive restraints imposed by state and local governments in Brazil. Both of these areas include elements of competition advocacy, but in some cases direct action by the competition agencies might be warranted.

79. As noted below, the liberalisation of network industry markets in Brazil is proceeding at a different pace in each sector, but the overall direction is positive. In many of these sectors privatisation is complete or nearly so, and new, independent regulatory agencies have been created in some of them. The three competition agencies have established working relationships with these new agencies, with the aim of promoting competition policy within the regulatory scheme. There is a place for competition enforcement within these sectors as well, however, especially in situations in which the regulation is not fully in place. It is likely that many of the incumbents in these markets have market power, and there is a risk that they will abuse it. SEAE, SDE and CADE can be alert to such possible abuses and where it is both legal and sensible within the regulatory scheme, bring enforcement actions under the competition law to correct them. One such case has already come before SDE, involving a natural gas distribution company in the state of Rio de Janeiro. That case is described more fully in Section 2 below.
80. As noted above, the system of government in Brazil is a federal one. The 27 states and constituent communities have some degree of autonomy in economic matters, though they do not have separate competition laws or general regulatory authority. It appears that these state and local governments have preserved some complex, anticompetitive rules and regulations that interfere with the efficient operation of local markets. CADE could perform a highly useful function by addressing some of these restraints. It has done so already to a limited extent, as described above, employing its consultation procedures. It appears that CADE is limited in its ability to enforce judgements against state and local government bodies, but as the national competition agency it has considerable political and moral authority in this regard. Decisions by the Council either under the consultation procedure or pursuant to Article 7(X) of law 8884, by which it can “request” that state and municipal authorities take action to remedy violations of the law, could have beneficial results in promoting competition in state and local markets.

81. As noted above, CADE and SDE have taken a conservative view of abusive pricing cases under law 8884, generally declining to initiate such cases. Most competition experts agree that this is the correct approach. Abusive pricing is very difficult to identify – what are proper measures of costs; what is an acceptable level of profit? – and even more difficult to control – what is the “correct” price; how will it be administered? Competition experts prefer that a competition agency focus on the underlying market structure or exclusionary conduct that can permit a dominant firm to reap excessive profits. It may be unfortunate, therefore, that SDE has been required recently to begin what appears to be a very large and complex investigation of abusive pricing of pharmaceuticals. This investigation will undoubtedly occupy a large proportion of SDE’s already limited resources, which would hinder its work in other, important areas of competition enforcement. National policy, especially in developing countries, may include some formal approach to price controls, at least in emergency situations, but in general it is not consistent with a fully functioning market economy, and most experts agree that it should not be administered by the competition authority.

1.4.3 Merger Cases

82. CADE, SEAE and SDE appear to be aware of, and attempting in good faith to apply, generally accepted principles of merger analysis. SEAE’s merger guidelines and CADE’s publicly-stated merger analysis paradigm are fully consistent with those applied in many countries, including OECD countries. While there have been disagreements about the final result in a few cases, most notably the recent AmBev case, any perceived shortcomings therein do not appear to have resulted from any fundamental errors in analysis or judgement. The controversy, to the extent that it exists, in merger control within the country has to do with procedure. There are two features of merger control procedures in Brazil that frame the issue: merger review is conducted by three separate agencies, two within the government and one independent; and merger control is ex post, not ex ante. The two, indeed, are related.

83. As noted above, it can take, and often does, six months or more to conduct a review of any merger, even one that presents no apparent competition issues. Each agency may conduct its own investigation and fact gathering, which further lengthens the process. The relationships between SEAE and SDE, on the one hand, and CADE, on the other, are on the whole formal, which is undoubtedly a necessary aspect of CADE’s status as an independent agency. The result, however, is a loss in efficiency. CADE and SEAE, for example, utilise different notification forms. In general, CADE is unable to fully take advantage of the experience and expertise of its sister agencies.

84. The three agencies are making efforts to streamline their procedures, as described above. SEAE and SDE can and do co-operate more closely on an informal basis. With increasing frequency, CADE is simply adopting one or both of the reports of the others as its own, rather than authoring a new decision. The ongoing challenge facing the three agencies, however, is this: to find ways of simplifying and speeding the review of the 90 to 95 per cent of all mergers that are competitively benign. Such a
development would benefit the business community, but it would benefit the competition agencies at least as much, by freeing scarce resources to engage in important conduct investigations and cases.

85. The second major issue facing the Brazilian competition agencies relating to mergers is the lack of premerger control. It is recommended that the Brazilian authorities consider seriously the amendment of the competition law to provide for premerger control. Not all countries employ premerger control, of course, but many do, and it would appear that such a change in Brazil would ameliorate some of the problems that now affect merger review in that country. The fact that the review of even a simple merger can take six months or more negatively impacts the ability of the agencies ultimately to obtain that power. However. The business community would oppose premerger control if it meant that they could not consummate their transactions for such a period of time after reaching agreement. Under the current system, however, the merging parties are themselves the cause of some of the delays. They have no incentive to hasten the process, as they have already consummated their transaction. Under a premerger control system, on the other hand, the parties have an incentive to complete the review quickly, as they cannot consummate until the review is finished. A premerger control system with firm deadlines, coupled with enhanced co-ordination of the procedures in the three agencies, would without question result in a shortening of the review process.

86. The lack of premerger control in Brazil not only has the procedural implications noted above, it also has obvious substantive effects. When CADE is confronted with an anticompetitive, consummated merger, its remedy options are significantly reduced. Breaking apart a consummated merger is exceedingly difficult. As noted above, CADE has done so only in two cases, none since 1996. It is left with the options of partial divestiture or behavioural remedies, or both. Thus, the remedies in the Colgate and AmBev transactions were somewhat regulatory in nature. CADE might have preferred to impose a simpler and more definitive structural remedy, or outright prohibition, had it been possible.

87. Also, as discussed above, the ex post feature of merger control in Brazil contributes to the growing litigation over the “trigger date” that starts the running of the 15 day period within which a merger notification must be made. For good reason, CADE wants to receive the notification as soon as possible, given that the transaction will be consummated before the review is complete. In a premerger control environment, on the other hand, the competition agency is less concerned about receiving early notification, because the parties cannot consummate their merger until some time after notification. In that context, the incentive for quick notification shifts to the parties, who want to complete the transaction as quickly as possible.

88. In any case, one hopes that the controversy over the language in Resolution 15 defining the trigger date, which is occupying significant resources in CADE, will be resolved soon, if necessary in the courts. Unfortunately, the “alterations in the competition relations between the Applicants” language in the resolution is inherently ambiguous. CADE might be better off using the “first binding document” standard in the same resolution, which though possibly later in time is more certain, ultimately saving the agency resources that would be spent in investigating and litigating cases under the former standard. In egregious cases, if parties significantly alter their competitive relationship before reaching a definitive merger agreement, the matter could be prosecuted under Articles 20 and 21 as anticompetitive conduct.

89. CADE introduced an interesting remedy in the AmBev and WorldCom/Sprint cases—a preliminary order preventing complete integration of the parties’ operations pending completion of the review. Such an order obviously ameliorates, but does not eliminate, the remedy problem associated with postmerger review. CADE’s authority to issue such orders and the standards therefor, however, have not been fully articulated. In neither of the two cases did the parties oppose the order. It would seem that CADE could not issue such orders wholesale, and that they would have to be reserved for mergers in which the potential for an anticompetitive outcome is significant and easily demonstrated.
90. The rules defining the obligation to notify also raise some issues. First, as noted above, Article 54 applies to “any acts that may limit or otherwise restrain open competition. . . .” These terms include all agreements, not just mergers. In practice, the notifications to date have been confined mostly to mergers and joint ventures, but the potential exists for the notification obligation to be expanded to other types of restrictive agreements. If that were to happen it would impose a significant additional burden on the competition agencies of having to review such notifications, which would be likely to bear little fruit. In those countries whose competition laws initially required the notification of restrictive agreements (not mergers), the clear trend is toward reducing or eliminating that requirement. It would appear, however, that such a change would require an amendment to Article 54.

91. Article 54 further limits notifiable transactions to: “when the resulting company or group of companies accounts for twenty percent (20 per cent) of a relevant market, or in which any of the participants has posted in its latest balance sheets an annual gross revenue equivalent to R$400 million.” Three issues are raised by these thresholds: 1) the R$400 million minimum is not limited to revenues derived in Brazil; CADE officials confirm that the threshold applies to world-wide revenues, thus giving rise to the possibility that a merger having minimal impact on Brazilian markets would have to be notified to Brazilian authorities. 2) the R$400 million can be earned by “any” of the merging parties; there is no minimum that applies to the other party or parties. Technically, therefore, even a tiny acquisition by a very large company would have to be notified. 3) the 20 per cent market share test introduces a subjective element into the notification obligation: market definition. The parties and CADE could disagree in good faith about the definition of the relevant market for this purpose, giving rise to uncertainty about whether a transaction must be notified.

92. The first two of these issues offer the possibility that some mergers that are highly unlikely to harm Brazilian consumers would nevertheless have to be notified, resulting in unnecessary costs both to the merging parties and the competition agencies. The problems could be corrected by limiting the revenue threshold to revenues derived in Brazil (though if that were done it would be necessary to inquire as to whether R$400 million would be too high), and adding a minimum revenue threshold for the other parties to the merger (it could be much smaller than the first threshold). Such changes, of course, might require an amendment to the law itself.

93. The third issue, the market share test, is more controversial. Some countries prefer not to have such a test for purposes of notification, for the reasons outlined above. Other countries, however, do employ such a test, and find that it is not difficult to administer. As noted above, CADE statistics show that in 1999, 12 per cent of the notifications were triggered solely by the market share test. CADE might review its experience to date to determine whether the test has caused any significant problems. In informal interviews, CADE officials justified the test, saying that it generated notifications of mergers that were potentially anticompetitive. One private practitioner stated that it had not been a burden on his clients.

1.4.4 Institutional Issues

94. The separation of powers between SEAE, SDE and CADE has been discussed throughout this report. The principal benefits of this system are to ensure CADE’s independence and to utilise existing resources in the ministries. But CADE’s independence is compromised to the extent that it does not have authority to initiate new initiatives or proceedings on its own. And while resources from the ministries are made available, the system does not permit them to be used efficiently. There is duplication of effort, and expenditure of too much time. As noted above, the average merger investigation takes seven months. Conduct investigations also may take a long time; several have taken more than two years. These criticisms do not at all imply a lack of professionalism or dedication at any of the three agencies. To the contrary, the staffs at all three are highly skilled and motivated. The level of expertise and analytical skills
of these professionals exceed those in many other countries, including some that have been actively enforcing competition laws for a much longer time than Brazil.

95. This report will not recommend any specific plan of reorganisation, which would have to take into account the particular traditions and institutions of Brazilian government. It seems clear, however, that there needs to be more integration of the investigative and adjudicative functions of competition enforcement, and elimination of duplicative effort among the three existing agencies. There can and should be some formal separation between the decision makers and the investigators, especially if an independent commission form of competition agency is retained, but the two functions could be more closely co-ordinated, and the Council, if that system continues, could be given greater authority over the general direction of competition policy in the country.

96. There is much to be said for incorporating all functions of competition enforcement within one agency. That is the norm in most countries. Such a wholesale reorganisation, of course, would require an amendment to the law. Short of that, the three agencies could explore informal means of consolidation. SEAE, for example, with its cadre of expert economists, could concentrate on technical analysis, and SDE, which is experienced in investigation, could concentrate on fact gathering, with the participation of SEAE experts where possible. To speed the merger review process the two agencies could consider collaborating on a single report. CADE could expand its participation in the investigation phase, to the extent the law allows, by employing a staff of experts who would join in the SEAE/SDE phase, and simultaneously reduce or eliminate its own fact gathering activities. CADE could also permit greater participation by SEAE and SDE in its proceedings, which would permit it to derive maximum benefit from the preliminary efforts of those two agencies in a case.

97. A second institutional issue facing competition policy in Brazil has been pointed up by the recent, nearly simultaneous expiration of the terms of four CADE commissioners, one of whom was the President. The President and one of the commissioners could not be reappointed, as they had already served the maximum of two terms. The other two had served only one term, but they were not reappointed. Four new commissioners were named to fill these vacancies. The result was a simultaneous turnover of a majority of the Council, coupled with the loss of an experienced cadre of professionals who had been supporting the outgoing members. There were two aspects contributing to the situation: the fact that the four terms expired nearly simultaneously, and the short, two year length of a term. The first could possibly be remedied by an administrative action that would stagger the terms. Dealing with the second, of course, requires an amendment to the law. Two years is a short period for a term of any elected or appointed official, and especially one who is appointed to a supposedly independent body. A longer term, say five to seven years, is preferable. There would be no need for reappointment if the term were longer.

98. Aside from concerns about the loss of continuity at CADE resulting from the recent turnover, the situation raises the broader issue of the need for independence of a national competition agency. An intelligent and effective application of competition policy, no less than other regulatory policies, requires that the competition agency not be subject to sudden or dramatic shifts in politics or government. In some respects, CADE has been given a substantial degree of independence. Law 8884 provides that “CADE decisions do not qualify for Executive Branch review,” and that CADE commissioners cannot be dismissed except “by a decision of the Senate, [upon] a request of the President of the Republic, as a result of unappealable criminal sentencing of any such member for malicious crime, or in light of disciplinary action as set forth in . . . [certain other laws],” or for violation of the rules against conflicts of interest. This independence is compromised, however, by the short term for commissioners provided in the law. The entire Council is subject to being replaced every two years, which negatively impacts its ability to set and maintain an independent course on behalf of the country’s consumers.
99. SDE and SEAE, of course, are part of government ministries. It is certainly possible for a government ministry to exercise independence in matters of competition policy; many countries employ this model. These two agencies appear to have acted independently in the past in conducting their competition enforcement responsibilities. The recent events leading to the institution of abusive pricing proceedings in SDE, however, gives some pause in this regard. In any case, it will be necessary in the continuing evolution of competition policy in Brazil that the independence of the enforcement agency or agencies be preserved and enhanced as much as possible.

2. Competition Policy and Regulation in Brazil

100. Many sectors of the Brazilian economy, formerly characterised by state-owned or publicly sanctioned monopolies, are undergoing restructuring. State-owned assets have been privatised, government controls have been removed, and new entry has been permitted. In some sectors, new, independent regulators have been created. The pace of reform varies from sector to sector, however.

101. There are no specific exemptions from the competition law for any of the regulated sectors; law 8884 on its face applies fully to them. The interface between regulation and the competition law is not well defined at this stage, however. Competition enforcement may have to give way to regulation in situations where the two cannot co-exist, that is, where the regulatory scheme could not work as provided in law if the competition law were also fully applicable. Such “implied exemptions” from the competition law should be narrowly construed, however. As noted in Section 1 above, there have been few competition cases initiated in regulated industries to date, although that could change in the future.

102. The remainder of this report will outline the liberalisation process in each of several sectors of the Brazilian economy. The role of competition policy and of the competition agencies, including the agencies’ role as advocates for competition in regulated sectors, will also be described, where applicable.

2.1 Competition Advocacy by the Competition Agencies

103. There is an important role for a competition agency in every country as the advocate for competition policy in all aspects of government operations, especially including legislative activity and regulation. Government officials and regulators outside the competition agency may be unsophisticated in competition policy and unaware of its importance to their activities and to the consumers who are their constituents. Competition is possible in most aspects of every economic sector, including so-called “network industries,” in which some parts may have natural monopoly characteristics. The competition agency can make a significant contribution to regulatory policy in such sectors by intervening, either formally or informally, in major decisions by the regulator for the purpose of encouraging policies that foster competition wherever it is possible.

104. CADE is relatively new to competition advocacy, but it understands its importance, and recently it has undertaken significant new initiatives in this area. The most important of these have been the establishment of working groups with the three independent regulatory bodies in the telecommunications, electricity and oil and gas sectors, described further below in the individual sector discussions. SEAE has been more active in competition advocacy, which is to be expected, given both its cadre of expert economists and its position as part of the Ministry of Economy, which is one of the most powerful ministries in the government. SEAE has advised the regulators in electricity, petroleum, civil aviation and ports, on specific occasions. SDE has also participated in competition advocacy in the natural gas sector. All of the three agencies, however, have limited resources for this activity.
105. There is an important role for competition policy in privatisation of state-owned assets – to ensure that public monopolies are not simply transformed into private ones. Law 8884 applies to privatisations, which means that those transactions are considered as mergers, which means in turn that the shortcomings in merger review procedures discussed above affect the review of privatisations as well. In particular, privatisations are formally reviewed post consummation just as in mergers. Of course, the agencies can have an informal, advisory role in privatisation decisions before they are finalised. SDE has participated in some discussions with BNDES, the National Bank for Social and Economic Development, which is responsible for organising many federal and state privatisations. It does not appear that the competition agencies have had an important advisory role in the privatisation process, however, but their recent initiatives suggest that they will be more likely to do so in the future.

106. A more general aspect of competition advocacy is the public relations/educational function of a competition agency. It is important that the agency work to create a “competition culture” in the country, by educating consumers, businesses, educators and public officials about the importance of competition policy. In this area CADE has excelled in recent years. The plenary sessions of the Council are open to the public. The Council’s decisions and those parts of the case files that are not confidential are publicly available. CADE regularly sponsors seminars and conferences on various aspects of competition policy, featuring experts from other countries. It has encouraged and supported the teaching of competition policy in the country’s universities and law schools. It publishes an attractive, informative annual report; it maintains a World Wide Web site; and it has established good relations with the press.

107. The following sections of this report describe the process of regulatory reform in several specific sectors of the Brazilian economy.

2.2 Liberalisation and Regulatory Reform in Specific Sectors

2.2.1 Telecommunications

108. The General Telecommunications Act of 1997 introduced broad reforms in this sector. It created a new, independent regulatory body (Agência Nacional de Telecomunicações – ANATEL), with the jurisdiction and resources for broad regulation of the industry. The Act introduced a new regime for the provision of telecommunication services. It explicitly preserved, however, the role of competition policy in this sector, as described further below.

109. Telebras, the former state-owned telecommunications monopoly, was privatised in 1997-98. Several regional companies were created and were given franchises to provide local and intra-regional fixed wireline service within their regions. A separate company, Embratel, was given the long distance and international franchises. The regional companies were not permitted immediately to offer long distance or international service, and Embratel could not provide local service. The plan provides for a measured introduction of competition in all of these services. One new competitor, a “mirror company,” was permitted immediately in each region and for long distance. To provide local service the mirror companies could lease the fixed wireline facilities of the incumbent or install new “fixed wireless” facilities. Currently only two mirror companies are operating in local markets, however. A new company, Intelig, began providing long distance and international service in January, 2000. After 2001, entry into all markets by new competitors will be unrestricted, and after 2003, Embratel can begin providing local service and the incumbent regional companies can begin providing long distance service.

110. The incumbent providers, both regional companies and Embratel, are subject to price cap regulation by ANATEL. The prices of the mirror companies are not regulated. It is intended that price regulation will be phased out as competition increases in these markets. The incumbent regional
companies also have certain universal service obligations, for which they are responsible to ANATEL. Those who satisfy their obligations can begin to offer long distance service in other regions and local service in other regions in which the incumbent has not satisfied its universal service obligation.

111. There are currently two mobile telephony providers in each region, using “A” and “B” bands. The A band was formerly state-owned, and was privatised. Rights to provide B band service were auctioned, using two criteria: the bid price for the franchise and prices to be charged consumers (bid price or less). Cross ownership between fixed and mobile service providers is prohibited. Embratel’s facilities are used to provide long distance service to mobile subscribers. Long distance fees are paid by mobile subscribers to their local provider, which in turn pays Embratel. Plans are underway for the award of a third, “C” band throughout the country.

112. The Telecommunications Act explicitly provided for the application of the competition law to that sector, and authorised both ANATEL and CADE to enforce it. Article 7 of the Act provides that “the general rules governing the protection of the economic order [which include law 8884] shall apply to the telecommunications industry whenever they do not conflict with the provisions of the Act.” Further, Article 19 provides that ANATEL “shall have the legal authority to control, prevent and curb any breach of the economic order in the telecommunications industry, without prejudice to the powers vested in . . . [CADE].” Thus, conduct cases may be considered by either ANATEL or CADE, or both. In general, ANATEL assumes the role of SDE in telecommunications cases: ANATEL conducts the investigations and CADE renders the judgements.44

113. Mergers in the industry are subject to special rules. Mergers of providers of “public law services” (generally, services provided by providers that have universal service or access, which includes the incumbent regional telephone companies), are subject to prior control by ANATEL (the only context currently in Brazil in which there is premerger control). At the same time, law 8884 applies to these mergers and to all others in the telecommunications industry. This may mean that, given the notification thresholds in law 8884, some mergers of public law providers are subject to control by ANATEL but not by CADE. In any case, in those transactions subject to law 8884 ANATEL, and not SDE, has the role of preparing an opinion for CADE.

114. It is not yet clear how CADE and ANATEL will deal with the overlapping jurisdiction created by the Telecommunications law. The two agencies have established a working group that is currently considering those issues and is also co-ordinating work on cases that involve both agencies. The proposed merger of WorldCom and Sprint was such a case. WorldCom is the principal owner of Embratel, and Sprint is an owner of Intelig, Embratel’s competitor in long distance and international service. As noted above, WorldCom/Sprint was the second merger, after AmBev, in which CADE entered a preliminary order preventing full consummation of the transaction. ANATEL entered a similar order.45

115. In several ways, the telecommunications sector is unique among the regulated industries in Brazil in the way that competition policy has been formally incorporated into the regulatory regime. Only in this sector has the regulatory agency supplanted SDE in the review process. ANATEL is aware of the importance of competition in this sector and seems to be committed to promoting it where possible. As noted above, however, the practical aspects of the integration of competition and regulation in this sector have yet to be fully worked out.

2.2.2 Electricity

116. A second regulatory agency created in 1997 was the Agência Nacional de Energia Elétrica – ANEEL, responsible for the electricity industry. It is overseeing the privatisation and liberalisation of the
industry, which is proceeding rather slowly. Ninety percent of the country’s electrical generation capacity is hydroelectric. These plants, which are almost all state-owned, are very large, and located far from the country’s population centers. The largest hydro sites in the south and southeast sectors – the most populous ones – have been developed. There are two nuclear plants in the country, one of which has yet to become operational. ANEEL has a thermal power development program underway, utilising gas-fired plants, which is projected to account for about 12 per cent of the country’s capacity. Privatisation of the big hydro plants has proceeded slowly, but ANEEL recently announced that the three largest hydro companies, Furnas, CHESF and Eletronorte, which account for more than 50 per cent of the energy generated in Brazil, will be privatised in 2001. These privatisations are an essential step in the restructuring of the electrical sector in Brazil.

117. The transmission grid is also state-owned. There are plans to separate it from generation, privatise and regulate it. There are 11 new lines being added to the grid, the rights to which are being auctioned by ANEEL. Privatisation of distribution assets is proceeding more quickly; approximately 60 per cent has been privatised.

118. ANEEL is working toward competition in the wholesale market in the shorter run, which would permit distributors and large consumers to contract directly with generators. Retail competition is farther away. Retail customers continue to be subsidised to some extent. There is much to be done to reach the goal of wholesale competition, however, including the difficult task of separating and privatising the existing large, vertically integrated state-owned utilities and re-working the many large, long term supply contracts that now exist.

119. The law establishing the new electricity regime, like the Telecommunications Act, requires ANEEL to give effect to competition in the industry where possible. ANEEL has entered into co-operation agreements with all three competition agencies. The parties have agreed to share information and technical expertise; ANEEL has pledged to work with SDE in its conduct investigations, and it provides technical opinions to SDE and CADE on mergers and privatisations in the industry, which are fully subject to the competition law. ANEEL has also pledged to develop relationships with the other national regulatory bodies, ANATEL and ANP.

120. In sum, regulatory reform in the electricity supply industry has begun, but is proceeding slowly, as it faces significant problems in separating and privatising the vertically-integrated, state-owned utilities. The plan includes the now-familiar concepts found in many national restructuring programs in electricity, separating the potentially competitive markets of generation and distribution from the transmission grid and promoting competition in contracting between generators and wholesale, and ultimately retail, customers. ANEEL has established formal relationships with the competition agencies and as the pace of privatisation and restructuring increases in the next few years is prepared to work with them in matters of competition policy.

2.2.3 Natural Gas and Petroleum

121. The Hydrocarbons Law of 1997 created a new regulatory agency to oversee the natural gas and petroleum markets, the Agência Nacional de Petróleo – ANP. The state-owned firm Petrobras had been a monopolist in the production, refining and pipeline transportation of these products. The 1997 law officially ended that monopoly, but Petrobras, still state-owned, continues to be the dominant firm in these markets. ANP is implementing some reforms pursuant to the new law, but the progress is slow.
2.2.3.1 Natural gas

122. Brazil is not self-sufficient in natural gas. It imports a substantial portion of its requirements from Bolivia. Recently a new pipeline from Bolivia was completed and a 30 year supply agreement was reached. In the south, construction of a new pipeline from Argentina is underway. The pipeline systems in the north and the south of the country are not integrated, but there are plans to do so. Brazil consumes relatively little natural gas for a country its size (little is required for heating, for example), but there are plans to expand its use, principally for electricity generation. A program is underway to construct 50 new terminals along existing and new pipelines, at which there will be gas-fired generating plants.

123. Until the 1997 reforms, Petrobras had a monopoly in exploration and development of natural gas fields in Brazil. Now all domestic reserves are considered property of the government. The Ministry of Mining and Energy awards concessions, by means of auctions, for exploration. Petrobras continues to conduct most of the exploration and development, however. Petrobras also controls most of the transmission pipelines in the country. The 1997 law requires that production and transmission facilities be separated into different legal entities, but does not forbid cross ownership of these entities. Thus, Petrobras continues to control both markets.

124. ANP has promulgated rules relating to cross-ownership and self-dealing, but currently they do not extend much beyond the obligation to report such relationships or transactions. An important issue facing ANP is ensuring open access to the transportation pipelines; capacity in the system is constrained at some locations. ANP is working on access regulations; currently, pipeline operators are required to publish information on available capacity.

125. The government has historically controlled natural gas prices, a joint effort of the Ministries of Finance and Mining and Energy. Currently the price of domestically-produced gas is subject to price cap regulation to the city gates, where state regulation takes over (see below). There is no price regulation of imported gas. A deregulation plan in the process of implementation envisions that consumers and distributors will eventually be able to contract directly with suppliers. A special rule on prices (Joint Rule 3) applies to the 50 new terminal operators. It was felt that some sort of price guarantee was necessary to induce investment in these facilities. Those prices are pegged to a reference price based on a basket of international prices of oil. Transportation prices continue to be regulated by ANP.

126. A unique situation involving local distribution networks exists in Brazil. The constitution reserves to the states the right to control these networks. Accordingly, reform at this level is evolving differently in each of the 27 states, and at different paces. In some, the state continues to operate the network; in others there has been privatisation and regulation; and in some the right to operate the network is granted by concession.

2.2.3.2 Petroleum

127. The situation in petroleum resembles that in natural gas in many respects. A substantial portion, up to 40 per cent or so, of the country’s oil requirements is imported. The former Petrobras monopoly was officially eliminated by the 1997 Hydrocarbons Law, but it retains virtual monopoly power in domestic crude production, refining and transportation. As in natural gas, rights to explore domestic oil reserves are now awarded by government concession. Petrobras has won most of the concessions, however.

128. The ex-refinery prices for the principal refined products are established by Ministries of Finance and Mining and Energy. The tariffs for pipeline transportation of refined products are established by ANP. Rules for open access to oil and refined products pipelines are under final discussion within ANP.
which expects to publish the rules by mid-2000. It is expected that the rules will establish a transition phase during which open access will not be mandatory, with ANP continuing to establish the tariffs. By the beginning of 2001, the tariffs would be negotiated between shipper and carrier under the new open access rules, and ANP would stipulate the tariffs only if no agreement is reached.

129. ANP approval is required for the construction and operation of pipelines and terminals, which is open to any Brazilian company. As in natural gas, ANP rules require that the ownership and operation of pipelines and production facilities be in separate legal entities, but the rules do not prohibit cross ownership of such entities.

2.2.3.3 Competition policy in the sector

130. The competition law applies to the oil and gas sector in most respects. The hydrocarbons law explicitly requires the promotion of competition in the sector. As with telecommunications and electricity, working groups between ANP and the competition agencies have been created. These groups were only recently formed, however, and have not begun to operate. There have been a few competition cases in oil and gas. Some mergers have come before CADE, and as noted above, a cartel investigation of gasoline retailers is underway in SDE. The following case involved some interesting issues regarding the application of the competition law to natural gas distribution, which as noted above, is under the control of the states.

NATURAL GAS DISTRIBUTION IN RIO DE JANEIRO

Prior to 1997, natural gas distribution in the state of Rio de Janeiro was a state-owned monopoly. In 1997 the state divided the distribution assets into two enterprises and privatised them. It also created a new regulatory agency to oversee public utilities in the state, including the two gas distributors. In 1998 both companies raised their prices by significant amounts. The increases were within the contract limits that had been established at privatisation, but were substantially above the rate of inflation. Some large industrial customers refused to pay the higher prices and were threatened with a cutoff in supply. The customers complained to SDE that the gas distributors were abusing their dominant position. SDE issued a preliminary order under Article 52 of law 8884 forbidding the gas distributors from cutting off the complaining customers until the completion of the SDE administrative proceeding. The distributors appealed the preliminary order to CADE.

The distributors argued in their appeal that SDE and CADE did not have jurisdiction to decide the case under the competition law, because the conduct was subject to regulation. CADE upheld SDE’s order, however, concluding that the state regulation in this case did not supplant the competition law. CADE did recognise that the “state action doctrine” developed in the United States, which operates to exclude federal antitrust authority when a state is actively involved in regulatory conduct, was applicable generally in Brazil, but CADE concluded that the doctrine did not apply in this case because, among other things, the state regulatory agency was not actively supervising the gas distributors at the time in question.

131. In sum, reform in the natural gas and petroleum industries has begun, but much remains to be done. ANP and the government face difficult decisions regarding the privatisation of Petrobras (there is no timetable for this privatisation, which may be the most difficult and controversial of all in Brazil), the separation and regulation of its transportation monopolies and the introduction of competition in oil refining. The groundwork for co-operation between ANP and the competition agencies has been laid, but the interaction has been minimal.
Civil Aviation

Civil aviation in Brazil is under the control of the Department of Civil Aviation (DAC), which is within the Brazilian Ministry of Defence. The Director General of DAC and approximately 15-20 per cent of its employees are military personnel. The stated rationale for the continuing relationship between civilian and military aviation is that both sectors share some facilities, including airports and the air traffic control system.

The civilian airlines in Brazil are privately owned. Four large airlines dominate the Brazilian markets: VARIG, TAM, TransBrasil and VASP. Together they control about 95 per cent of total civilian air traffic in the country. There are several small airlines serving specific routes; some of these are recent entrants. The big four airlines have had varying degrees of success in the past decade. TAM has grown the most rapidly of the four, having begun by serving the most heavily travelled routes through older, center-city airports. VASP is generally considered to be the weakest. In 1999 VASP proposed a consolidation of the four airlines, but the others did not support the idea. The devaluation of the Real in 1999 coupled with the rise in fuel costs negatively impacted the big four, all of whom lost money that year. All four are affiliated with international alliances. Brazilian law limits foreign ownership in domestic airlines to 20 per cent, however.

There are 68 major airports in Brazil, which are owned and operated by a government agency, Infraero. Approximately 100 smaller airports are operated by municipalities, and there are many more small, privately operated "airdromes.”

There has been gradual deregulation of the civil aviation sector since the early 1990s, but some controls remain. Initially, pricing "bands" were imposed: airlines could price within a range, generally 65 per cent below or 35 per cent above a target price. This gave way under the Real Plan to the imposition of a price ceiling, which is adjusted once a year. Those controls continue. In 1999, because of the devaluation, the industry requested a relatively large increase of approximately 18 per cent, but DAC granted only 10 per cent. The airlines are free to offer discounts, but there appears generally to be less discounting in Brazil than in some other countries. The airlines claim that because they cannot increase charges to business customers as much as they might otherwise be able to do, they cannot afford deeper discounts to leisure travellers.

Government constraints on entry, other than those relating to safety, are being phased out. As noted above, TAM expanded rapidly in the 1990s and there has been some entry at the regional level, but in other respects the market structure has remained relatively stable. In the early 1990s an official commission controlled route assignments. The airlines met regularly with the commission, and directly exchanged information about their operations and future intentions. The commission was abolished in the mid-90s and there are no longer any official controls over route operations. Today, however, the country’s airlines continue to meet regularly under the auspices of DAC, where they discuss issues relating to airports, traffic control and the environment. These discussions may include disclosure by the airlines of plans for new service. DAC does not intend that the meetings should be a vehicle for co-ordination of pricing or service, but the possibility exists that the meetings could facilitate such understandings.

The competition law applies fully to the airline industry. There have been few investigations or proceedings under law 8884 involving the industry, but as noted in Section 1 above, SDE has begun an investigation of possible anticompetitive horizontal activity among the airlines. There are no formal co-operation arrangements between the competition agencies and DAC, although DAC has expressed interest in developing informal relationships. The proposal by VASP to consolidate the big four airlines sparked a debate within the country on the future of the airline industry and the proper role for competition policy in it. Some within DAC hold the view that the model of unfettered airline competition coupled with
vigilance by the antitrust authorities against anticompetitive conduct and undue consolidation, generally practised in the United States, is not workable in Brazil, where the size of the market by most measures is a small fraction of that of the U.S.

138. In June, 2000, TAM and TransBrasil announced a code-sharing agreement and a probable merger. Soon thereafter, TransBrasil cancelled all its flights in the Rio-Sao Paulo shuttle service, reducing by 15 per cent the available seats on this busy route, and it also announced a new fare structure, which according to some resulted in a substantial reduction in its discounts. The code sharing agreement was notified to competition authorities under article 54.

139. In sum, while the civil aviation market in Brazil has been liberalised to a significant degree since 1990, some government controls continue to exist. While the competition law applies to civil aviation, the broader role for competition policy in the industry has not been defined.

2.2.5 Rail, Truck and Bus Transportation

140. Oversight of rail and interstate bus transportation services is conducted by the Secretary of Surface Transportation within the Ministry of Transportation. The bus sector is operated entirely by private parties; the rail system, however, is characterised by both private and public ownership. Both sectors are subject to continuing regulatory control by the government.

2.2.5.1 Railroads

141. Portions of the national railway system have been privatised, but some remains in government hands. The privatised portions are subject to a maximum ownership limit of 20 per cent by any one party, the stated purpose for which is to prevent large users from controlling railroads and discriminating in favour of themselves. Significant portions of the system, however, had been developed and continue to be operated by a large mining and steel company, CVRD, which itself was once state-owned. Concessions are granted by the government to private parties to operate on the state-owned parts of the system. CVRD also owns operates some concessions and has purchased interests in some privatised lines.

142. A Federal Railroad Transport Council has been created, consisting of three representatives from government, two from the users or shippers, and two from concession holders. The Council meets to consider issues of interpretation of concession agreements and the granting of track rights. Users can submit complaints to the Council regarding these matters. The concession agreements include "pricing bands," within which the operators are free to set their prices. Like airlines, the Ministries of Transportation and Finance conduct annual reviews of requests for upward adjustments of the pricing bands.

143. There is little intercity or interstate passenger rail transportation in Brazil, and there are no current plans to develop that sector.

2.2.5.2 Trucks and passenger buses

144. Truck transportation is unregulated in Brazil, except for technical and safety regulations. Interstate and international bus service are subject to regulation by the Ministry of Transport. Intrastate bus service is regulated by the states.
145. Bus transportation is the principal means of local and long distance transportation for most Brazilians. Interstate and international bus service can be provided only upon authorisation by the ministry. Currently, approximately 266 companies operate more than 2,000 interstate and international routes. Three companies, however, control about 52 per cent of the total number of routes. Concessions to operate bus routes are granted by the ministry. Some new concessions were granted in 1998, but prior to that no new concessions had been granted since 1974. There is substantial controversy regarding the concession process, and it is currently suspended pending a review. Firms have attempted to enter on several routes, some without having obtained concessions. Some of these firms have been successful in obtaining court orders permitting them to operate without a concession.

146. The ministry does not directly regulate prices. The award of concessions is based in part on price considerations, however. As in other sectors of the economy, the Ministry of Finance has some authority to nullify price increases that are considered too high. Price competition on most routes is not vigorous, though it is stronger where there has been new entry as described above. In some cases where more than one company operates on a route there is cross ownership between the competitors. The competition law applies to the sector, including its prohibitions against cartels. The ministry is studying ways of introducing more competition in connection with revamping the concession process. There are no plans to deregulate the industry in the immediate future. The ministry defends the regulatory regime as necessary to preserve universal service and continued investment in equipment in this transportation mode that is vital to so many people. Concessionaires must obtain ministry approval to withdraw from a route, demonstrating how the route would be served after their withdrawal.

2.2.5.3 Competition policy and rail and bus transportation

147. These two sectors are still heavily regulated, and there have been few cases or investigations under law 8884 in these sectors to date (as of June, 2000, there were two administrative proceedings in SDE underway involving alleged discrimination by CVRD, however). The competition agencies had little influence in the railroad privatisation process. They did review the privatisations, as the law requires, but did not object to what were, with hindsight, some anticompetitive transactions. There are some informal relationships between the Ministry of Transportation and the competition agencies. SEAE and SDE have participated in a working group on the review of the bus concession process, but the competition agencies do not have regular input into the regulatory process. It appears that many, perhaps most, markets in these sectors are dominated by one or two carriers, which could warrant closer scrutiny from the competition agencies.

2.2.6 Ports

148. Prior to 1993 the country’s ports were owned and operated by federal and state governments. In 1993 a new Ports Law introduced reforms in the sector, including the means for privatising the port facilities. The law was not fully implemented, however, as business and labour interests continued to disagree on the proper course for reform. In 1995 a new authority was created by Presidential decree: Grupo Executivo Para Modernização dos Portos – GEMPO. The authority, which is located within the Department of the Navy, is charged with co-ordinating the activities of five ministries – Transportation, Industry and Commerce, Labour, Economy and Navy – as they affect port operations. GEMPO has drafted a four year modernisation plan, covering the period 1999-2003, for the country’s ports. The plan contains 13 broad objectives, including modernisation of the infrastructure, exploration of means of privatisation of port assets, restructuring port administration, strengthening the process of collective negotiation between workers and management, promotion of the health and welfare of port workers, reduction in port costs and promotion of tourism through improved port usage.
149. Each of the country’s ports are now operated by a Port Authority, which is governed by a Port Authority Council. The Council is composed of representatives of the public sector (district, state and federal), workers, terminal operators and shippers. The ports have not been privatised fully, with one exception. The port authority grants concessions to private parties to operate terminals within the port facility. There may also be some privately-owned terminal facilities just outside the port boundaries. GEMPO continues to study means of privatising port facilities, which could include either outright sale or leasing of the facilities.

150. The competition law applies fully to port operations. GEMPO has developed a working relationship with the competition agencies. There were, as of June, 2000, ten cases or investigations in SDE and CADE involving ports and maritime transportation. CADE and SDE are considering possible cases involving anticompetitive agreements between pilots and between tug operators. The pricing policies of terminal operators are also being monitored for possible collusive activity. SDE is currently considering possible unlawful activity involving “terminal handling charges” – THC. Under current practice, shippers pay THC to ship operators, who in turn pay terminal operators for the service. Ship operators may be overcharging shippers for THC, however (many ship operators participate in international liner conferences, which carry on (usually lawful) cartels). There is a lack of transparency regarding the fees that ship operators pay to terminal operators.

151. In sum, port operations in Brazil are still in a transition phase. The private sector is now involved as concessionaires, while public agencies continue to exert overall governance. The competition law applies to the sector, and GEMPO and the competition agencies have a good working relationship.

2.2.7 Banking

152. There are currently about 6,600 financial institutions in Brazil, including commercial banks, investment banks, credit co-operatives, consumer finance companies, mortgage companies, brokers and mutual funds. The Central Bank of Brazil has regulatory responsibility for all types of banks. Separate regulatory bodies exist within the Ministry of Finance for insurance and for securities markets. Prior to 1988, most commercial banks in the country were owned either by the federal or state governments, and there were significant restrictions against participation by foreign banks in Brazilian markets. Since 1988 many of the state-owned banks have been privatised or purchased by the federal government. Some federally-owned banks have been privatised, but the largest are still in government hands. The two largest federally-owned banks, Caixa Economica Federal and Banco do Brasil, together control more than 40 per cent of the total bank deposits in Brazil. Since 1995 there has been significant entry by foreign banks into Brazil, although there are still certain restraints on foreign banks imposed by the constitution. There are about 220 banks of all types currently operating in Brazil.

153. The Central Bank, like bank regulators in all countries, exercises “prudential” regulatory control over the sector, approving new bank charters, setting rules on capital and reserve requirements, internal controls, accounting and investments. In general the Central Bank does not control prices – rates and fees. Home lending rates are fixed on the basis of current rates paid for time deposits, however, and a ceiling is placed on rural credit rates. By law, 25 per cent of bank demand deposits must be available for rural credit loans.

154. To date the competition agencies have not been involved in any significant way in the banking sector. Banking is not specifically exempted from the competition law, but the Central Bank continues exercise sole authority over competitive issues in the sector. Bank mergers are controlled by the Central Bank, which cites special circumstances such as dealing with “problem banks” and constitutional limits on entry by foreign banks as reasons for its hegemony. The banking law in Brazil is classified as a
“complimentary” law, which has a higher status than law 8884, which is an “ordinary” law. Law 8884 was enacted after the banking law, however, and it could be argued that by implication it amended or superseded the banking law in some respects. Whether bank mergers should be notified to the competition agencies under Article 54 of law 8884 is under discussion within the government. Similar issues exist regarding anticompetitive conduct in the industry. The 1990 consumer code explicitly applies to banks, and SDE has prosecuted some consumer cases in the industry, but there have been virtually no competition cases in banking. The Central Bank and CADE do have a working agreement similar to those between CADE and other regulatory agencies, which is used principally as a means of exchanging information.

155. In sum, the competition agencies have little direct involvement in the banking industry. It would seem, however, that in matters outside the prudential regulatory responsibilities of the Central Bank, the competition law could apply to the industry, which is the case in many other countries. The relationship between the banking and competition laws and between the responsible agencies is a matter of continuing discussion within the government.
NOTES

1. Articles 3 and 4.
2. Article 5.
5. Articles 13-14, 30-41.
6. Article 30.
7. Article 52.
8. Article 38.
9. Law no. 9021.
10. Article 42.
11. Article 43.
13. Article 50.
15. The lysine investigation is the result of close co-operation between the U.S. and Brazilian competition authorities. The U.S. Department of Justice provided SEAE with substantial evidence of cartel conduct affecting Brazil and other South American countries. The Brazilians, for their part, intend to share this information with other affected countries.
22. Article 21(XXIII) and (XXIV).
23. Paragraphs 4-8.
25. In two cases prior to 1996 CADE did prohibit the transaction.
28. Salgado, supra. Of course, the causation between these developments and the Kolynos decision could not be established.


Several OECD countries have strengthened their anti-cartel enforcement programs in recent years, enacting new and stronger laws applying to such conduct, imposing more severe sanctions for cartel operators, and providing new enforcement tools for the detection of cartel agreements. See, OECD, “Implementation of the Council’s Recommendation Concerning Effective Action Against Hard Core Cartels: Report by the Competition Law and Policy Committee,” 30 March 2000.

In a recent paper the former President of CADE listed as one of the three most important priorities facing the agency: “[to] overcome the institutional underinvestment with the creation of a permanent workforce at CADE, already determined by article 81 of law 8884, but not yet implemented.” Oliveira, supra.

It has been true that in countries in which competition enforcement is new, especially in countries in transition from centrally managed economies, cartel participants are unsophisticated at first. They may carry on their activities in the open, possibly even unaware that such conduct is now unlawful. This tends to change rather quickly, however, especially as the competition agency steps up its anti-cartel activity.


Of course, if the inquiry focuses on more traditional anticompetitive conduct, such as possible cartel agreements or harmful exclusionary conduct by dominant firms, the matter would be fully within the competence of SDE and CADE.

A period of six or even ten months for review of the few complex and potentially anticompetitive transactions that come before the agencies is not unusually long, by international standards.

These issues are of course obvious to the agencies’ leaders. In a recent article, the former President of CADE listed as one of his three top priorities: “rationalize the division of work among the Brazilian competition bodies and reduce the bureaucracy associated with conduct and merger controls.” Oliveira, supra.

As noted above, with the tentative agreement on joint merger guidelines, SDE and SEAE have begun this consolidation process. They are also exploring ways to speed review of simple cases that do not present competitive problems.

Article 50.

Article 5.

The third of three top priorities for CADE recently expressed by its former President was: “achieve greater interaction between CADE and the regulatory agencies.” Oliveira, supra.

Three seminars jointly sponsored by the OECD and CADE were been held in Brazil between 1997 and 1999.

www.mj.gov.br/cade


The MCI/Sprint transaction was under review in several countries, of course, and the parties had not taken any steps toward consummation. In June, 2000 the parties abandoned their proposed merger in light of opposition by both the United States and the European Commission on competition grounds.

There had been a rule imposed by DAC that no airline could derive more than 65 per cent of its revenues from service between Rio de Janeiro and Sao Paulo. The result was to exclude small carriers from this profitable route. It is not clear whether this restraint continues to exist.
47. See *The Economist*, May 6-12, 2000, *South American Airlines: Cancelled Flights*, at 64.